80-965

No.

Supreme Court, U. S.
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IN THE

United States Supreme Court

OCTOBER TERM, 1980

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENT,

Appellants,

vs.

LOUISE F. SHORT,

Appellee,

STATE OF INDIANA,

Intervenor.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

This is an appeal of the decision of the Supreme Court of Indiana in holding the Dormant Mineral Interests Act, (also known as the Indiana Mineral Lapse Act) Indiana Code 32-5-11-1, et seq. to be constitutional where the Act provides that a mineral interest severed from the surface ownership is deemed extinguished if use of the mineral interest is not made within twenty (20) years or a statement of claim setting forth the ownership is not filed in the county recorder's office.

1. **Due Process.**

Does the Dormant Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1 *et seq.)* violate the United States Consitution as to the Fourteenth Amendment by depriving landowners of their property without due process of law, in that non-use of a mineral right for twenty (20) years under the Act purports to extinguish the right without any notice or hearing?

2. **Equal Protection.**

Does the Dormant Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1 *et seq.)* violate the United States Constitution as to the Fourteenth Amendment by denying certain persons of the equal protection of the law when it provides that the owners of ten or more mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice and a chance to file their claim prior to extinguishment of their interest when similar treatment is not afforded to those having less than 10 mineral interests.

3. **Impairment of Contract.**

Does the Dorman Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1 *et seq.)* violate the United States Constitution as to Article 1, Section 10, by unreasonably im-

pairing the obligations of contracts in that it purports to terminate a contract right without consent or action of the parties?

4. **Just Compensation.**

Does the Dormant Mineral Interests Act of the State of Indiana (Indiana Code 32-5-11-1) violate the United States Constitution as to Section 1 of the Fourteenth Amendment by the taking of private property without any compensation when mineral rights are extinguished after 20 years of non-use.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case in this court. DeBeers Diamond Investment Ltd. was named a party below but a stipulation filed in the trial court shows they have no interest and are not a party before this Court. There is a companion (but not consolidated) case raising the same issues in the Supreme Court of Indiana, No. 1278S303, in which Ulysses G. Walden, Jr. and Carolyn Sallee Walden were Appellants and Eden H. Pond, Edna H. Bobe and Consolidation Coal Company were Appellees. This appeal attacks the constitutionality of the Indiana Dormant Mineral Act on behalf of oil and gas interest holders. The Walden case attacks the same act on behalf of coal interest holders. The Supreme Court of Indiana made no distinction between the two interests, holding both to be vested property interests.

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Appellants,

vs.

LOUISE F. SHORT,

Appellee,

STATE OF INDIANA,

Intervenor.

JURISDICTIONAL STATEMENT

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Indiana which appears in the Appendix herein, (page A-1) is reported at 406 NE 2d 625. It is not yet published in the official Indiana Reports. The opinion of the Gibson Circuit Court appears in the Appendix herein (page A-14).

GROUNDS OF JURISDICTION

This is a direct appeal from the decision of the Supreme Court of Indiana (the highest court of the State) holding the Indiana Dormant Minerals Interests Act (Indiana Code 32-5-11-1) to be constitutional under the United States Constitution. Jurisdiction of this Court is founded on 28 U.S.C. §1257(2). Judgment was entered by the Gibson Circuit Court on September 18, 1978. The Indiana Supreme Court rendered its decision on June 23, 1980. A timely petition for rehearing was filed and it was denied by the Supreme Court of Indiana on September 24, 1980. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Indiana on November 17, 1980. (Appendix, page A-28)

28 U.S.C. §1257(2) reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America

Fourteenth Amendment, Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 10, Clause 1:

> "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of altainer, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

STATEMENT OF FACTS

In Indiana and in many of the states there are many instances where the ownership of minerals (such as coal, oil or gas) underlying property is in the hands of persons other than those who own the surface of such property. In some instances these mineral rights have not been used for many years.

In an apparent effort to solve a perceived problem, Indiana in 1971 passed the INDIANA DORMANT MINERAL INTERESTS ACT (I.C. 32-5-11) (also known as the Indiana Mineral Lapse Act) (Hereafter referred to as the Act) (Set forth in full text at Appendix F).

The Act provides:

32-5-11-1 [46-1808]. Lapse of mineral interest—Prevention.—Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. [IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-2 [46-1809]. Mineral interest—Definition.—A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. [IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-3 [46-1810]. Use of mineral interests—Definition.—A Mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all right granted by such instrument. [IC 1971, 32-5-11-3, as added by Acts 1971, P.L. 423, § 1, p. 1970.]

32-5-11-4 [46-1811]. Statement of claim—Filing—Requirements.—The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty [20] year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. [IC 1971, 32-5-11-4, as added by Acts 1971, P. L. 423, § 1, p. 1970; 1972, P. L. 11, § 15, p. 336.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest—Exceptions.—Failure to file a statement of claim within the time

provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section 4 [32-5-11-4] preserve other mineral intersets, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is publied, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 1971, 32-5-11-5, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-6 [46-1813]. Successor in interest—Notice requirements—Prima facie evidence.—Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the

record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 1971, 32-5-11-6, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-7 [46-1814]. Statement of claim—Filing—Recorder's duty.—Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 1971, 32-5-11-7, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions—Time limit.—The provisions of this chapter [32-5-11-1—32-5-11-8] may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 1971, 32-5-11-8, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

Appellants are the owners of fractional undivided interests in oil, gas and other minerals underlying a tract of land in Gibson County, Indiana (the mineral interests). Appellee is the owner of the surface of such land. No use was made of the mineral interests for twenty (20) years immediately preceding September 2, 1971 (the effective date of the Indiana Dormant Mineral Interests Act [I.C. 32-5-11] [the Act]) nor for the two years following. At no time during the two year period were Appellants the owners of ten or more mineral interests in Gibson County, Indiana. Further Appellants did not file any statement of claim within the two year grace period provided by the Act.

Thereafter, Appellee surface owner filed an action for declaratory judgment with the Gibson Circuit Court against the

mineral interest owners praying that the mineral interest claimed by the Appellants be declared extinguished under the Act. Appellants filed answer claiming the Act to be unconstitutional under the Indiana and United States Constitutions. The matter was heard by the trial court based upon a stipulation where the only issue before the Court was the Constitutionality of the Act under both the Constitution of Indiana and the Constitution of the United States.

The trial court by written opinion (Appendix B) held the Act unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. On appeal the Supreme Court of Indiana held the Act constitutional under both the Indiana and United States Constitutions (Appendix A). The sole question before this Court is the constitutionality of the Act under the United States Constitution.

Indiana has held, in the opinion of the Indiana Supreme Court in this case, (Appendix A) that:

> "Interest of estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles."

Given a vested property right, can a State by legislation constitutionally determine that because the use of the mineral right was dormant for twenty years, the ownership of the mineral interests shall revert to the surface owner, without providing notice or opportunity for hearing prior to the extinguishment of the property right? Does this not violate the Fourteenth Amendment of due process and Article 1, Section 10 on impairment of contracts?

QUESTION IS SUBSTANTIAL

1. **Due Process.** The question is clear cut. Does the Act violate the procedural due process clause of the United States Constitution? The States of Illinois, Minnesota, Michigan and Wisconsin have passed similar laws and in each instance the Supreme Court of the respective State has held the Act unconstitutional as violating the United States Constitution. These cases are as follows:

Wilson v. *Bishop,* (1980, Ill.) ____NE 2d____ (Appendix I)

Wheelock v. *Heath,* (1978) 201 Neb 835, 272 NW 2d 768 (Appendix J)

Chicago & North Western Transportation Co. v. *Paderson,* (1977) 80 Wis 2d 566, 259 NW 2d 316 (Appendix G)

Contos v. *Herbst,* (Minn 1979) 278 NW 2d 732 (Appendix H)

Thus, the decision of the Supreme Court of Indiana is in conflict with the decisions of the court of last resort of four other states. This in itself raises a fundamental question of equality of constitutional treatment among the several states.

The Illinois statute is almost identical to the Indiana statute and that statute was held unconstitutional under the United States Constitution by the Illinois Supreme Court in *Wilson* v. *Bishop,* (1980 Ill) ____NE 2d____. The opinion is set forth in full at Appendix I. There the Court held:

> "The United States Supreme Court has emphasized that due process of law, at a minimum prohibits the deprivation of property without providing notice and an opportunity for a hearing appropriate to the nature of the case. [*Memphis Light, Gas & Water Division* v. *Craft,* (1978), 436 U.S. 1 13-16, 56 L.Ed. 2d 30, 41-43, 98 S.Ct. 1554, 1562-63; *Mullane* v. *Central Hanover Trust Co.,* (1950), 339 U.S. 306, 313, 94 L.Ed. 865, 872-73, 70 S.Ct. 652,

> 657]..."The statute provided no notice of any kind to record owners of oil and gas interests that they must record a statement of their interest in order to prevent the forfeiture of their property interests...Failure to provide those owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional."

The basic question presented is whether the Act denies basic constitutional rights under the banner of a perceived public interest. In *Sniadach* v. *Family Finance Corporation of Bayview,* (1969) 395 U.S. 337, 23 L.Ed. 2d 349, 89A S.Ct. 1820, this Court said: "The question is not whether the Wisconsin law is a wise law or an unwise law. Our concern is not what philosophy Wisconsin should or should not embrace."

The Indiana decision, if left standing, states an erroneous view of Constitutional requirements relating to procedural due process. The court below says that the Act is "self executing" and "does not contemplate an adjudication before a tribunal before the lapse occurs". From that it reasons that due process does not require notice and opportunity for hearing before the lapse occurs. Such reasoning is directly contrary to *Mullane* v. *Central Hanover Bank and Trust Company,* (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed 865, where this Court held:

> "The fundamental requisite of due process of law is the opportunity to be heard."

In *Memphis Light, Gas & Water Division* v. *Croft,* (1978) 436 U.S. 1, 56 L.Ed.2d 30, 98 S.Ct. 1554, this Court said:

> "This Court consistently has held that some kind of hearing is required at some time before a person is finally deprived of his property interest."

In *Sniadach* v. *Family Finance Corporation of Bayview, supra,* this Court held that a prejudgment garnishment of wages is unconstitutional "where the taking of one's property is so ob-

vious that it needs no extended argument to conclude that absent notice and prior hearing this prejudgment garnishment procedure violates the fundamental principles of due process."

In *Fuentes* v. *Shevin,* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, this court struck down the Florida and Pennsylvania prejudgment replevin statutes, holding, inter alia, that the statutes violated the procedural due process clause because there was no hearing before the seizure of property. This Court, speaking through Justice Stewart said (at 401 U.S. 83):

> "The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case', *Mullane* v. *Central Hanover Trust Co.,* . . . and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any)' . . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect."

The Indiana decision completely misreads *Anderson National Bank* v. *Luckett,* (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, when it cites that case as authority to support the Act under procedural due process. In *Anderson* the requirement of notice and opportunity to be heard was fully afforded to the dormant account holder. There was no forfeiture of the account holder's rights as here. The Kentucky act in *Anderson* merely transferred the dormant accounts from the Bank to the State. The rights of the account owner to the account were fully preserved in the hands of the State. The *Anderson* decision was the only case cited by the Court on procedural due process.

This case raises the question of whether or not the passage of the Act itself and its presumption that everyone knows the law is sufficient to satisfy the notice requirement of procedural due process. This Court has consistently said that to satisfy pro-

cedural due process the notice has to be reasonably calculated to apprise interested parties of the contemplated action. *Mullane* v. *Central Hanover Bank & Trust Co., supra.*

On the question of procedural due process, the decision of the Indiana Supreme Court in this case is in direct conflict with at least four other state courts on the same issue and is in conflict with the decisions of this court on an important federal question.

2. **Equal Protection.** Section Five of the Act provides that failure to file a statement of claim shall not cause a mineral interest to be extinguished if the owner of ten or more interests failed to do so by inadvertance after having filed a statement of claim as to other mineral interests. This section is unique to Indiana and is not found in the statutes of other states.

The section raises the question: Can a state constitutionally excuse one property owner from inadvertance in filing a claim because the property owner has more than nine mineral interests when it does not excuse property owners having nine or less interests? Does this not violate the equal protection clause of the Fourteenth Amendment?

It is submitted that this is arbitrary discrimination based on number of holdings. It can be explained only by realizing that the lobbists for the larger mineral interest holders were able to protect themselves while the smaller holders could not. The Act treats persons of the same class differently in violation of the equal protection clause. *Ohio* v. *Dollison* (1904) 194 US 447, 48 L.Ed. 1062.

Notice further that this section provides a statutory scheme for giving actual notice to the holder of ten or more interests and if he fails within sixty (60) days after actual notice to file his statement of claim the interest lapses. Thus, the statute provides a scheme or method of complying with the notice requirements of due process as to the holders of ten or more interests but does

not afford the same due process rights as to the holders of lesser interests. This is invidious discrimination on a fundamental constitutional right.

3. **Impairment of Contract.** The rights of mineral interests holders arises out of a deed or other document of conveyance. Such right thus arises out of contract. The effect of the Act is to destroy that contract right. Under the Act the right is not only impaired it is extinguished. The consequence of such destruction is to take a property right from the mineral interest holder and give it to the surface interest holder. We say that state action violates the Contract Clause of Article 1, Section 10 of the U.S. Constitution.

The ruling of the Supreme Court of Indiana is contrary to the decisions of this Court in *Home Building and Loan Association* v. *Blaisdell* (1934), 290 U.S. 438 54 S.Ct. 231, 78 L.Ed. 413 and *United States Trust Co. of New York* v. *New Jersey* (1977) 431 U.S. 1 97 S.Ct. 1505, 52 L.Ed 2d 92. In *Home Building and Loan Association,* this Court held:

> "The obligations of a contract are impaired by a law which renders them invalid or releases or extinguishes them."

In the *United States Trust Co. of New York, supra,* the Court, speaking through Mr. Justice Blackmun held that the contract clause limits the power of the states to regulate contracts between private parties. Admittedly, the absoluteness of the contract clause is tempered by the police power of the several states. But even the police power has its limitations. In *United States Trust Co. of New York, supra,* the Court said that a State is not free to impose a drastic impairment of contract when an evident and more moderate course would serve its purposes equally well. Here the action of the state was draconian. It provided for immediate and absolute extinguishment. Had the state required the giving of notice and an opportunity

for a mineral interest owner to have protected his right, the interests of the State would have been equally served and the Constitutional mandate satisfied.

4. **Just Compensation.** The Act has the effect of extinguishing a vested property right but in doing so it is taking private property from one person and giving it to the surface owner all without any compensation. This violates the just compensation provision of Section 1 of the Fourteenth Amendment. See *Wheelock* v. *Heath, supra* (appendix j); *Chicago & Northwestern Transportation Co.* v. *Paderson, supra* (appendix f); and, *Contos* v. *Herbst, supra* (appendix g). See also *Fuentes* v. *Shevin, supra.*

CONCLUSION

This case presents an important constitutional issue. It is clean cut, as there are no collateral facts to be weighed, the sole question being the constitutionality of the Act on its face. Four other state courts dealing with similar acts have held them invalid on Federal Constitutional grounds. The citizens of Indiana are entitled to the same protection of the same Federal Constitution.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX

Appendix A

Opinion of the Supreme Court of Indiana A-1

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APPENDIX A

(Opinion of the Supreme Court of Indiana)

Short v. Texaco, Inc.
Cite as, Ind., 406 N.E.2d 625

Louise F. SHORT, Appellant,

v.

TEXACO, INC., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Braselton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, DeBeers Diamond Investment, Ltd., Appellaees,

State of Indiana, Intervenor.

Ulysses G. WALDEN, Jr. and Carolyn Sallee Walden, Appellants,

v.

Eden H. POND, Edna H. Bobe and Consolidation Coal Company, Appellees,

Louise F. Short, Intervenor.

Nos. 179S23 and 1278S303.

Supreme Court of Indiana.

June 23, 1980.

DeBRULER, Justice.

The trial court declared Ind.Code §§ 32-5-11-1 through 32-5-11-8, the Mineral Lapse Act, unconstitutional. The Act puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years. The "use" of a mineral in-

terest which continues it in force includes actual production, payment of rents, royalties or taxes, or the filing of a claim in the dormant mineral interest record in the recorder's office. It granted owners of mineral interests a two year period of grace after its effective date in which to file the claim and preserve the interest. This is an appeal from two judgments below, consolidated here, that termination of an interest under the Act is contrary to due process, equal protection, and the guarantee of just compensation for property taken by the State.

The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use.

The trial court concluded that the legislative purpose of the Act is to facilitate the exploitation of energy sources and accepted such purpose as legitimate. While all its conclusions are not entirely clear, it went on to void the entire statute because it determined among other things that due process of law required the divestiture of the vested mineral interest to be preceded by due process notice and an opportunity to be heard.

[1] Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct

from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources.

[2] Courts of this state and nation have always given due regard to constitutional constraints upon their authority to void statutes. In doing so in *Noel* v. *Ewing*, (1857) 9 Ind. 37, we said:

> "It is due from the judiciary to sustain and reconcile their enactments, if possible. We will not lightly conclude that the law-making power has either ignorantly or wilfully violated the constitution. To justify the Courts in declaring an act voide, it must clearly subversive of that instrument. (Citations omitted.)
>
> They who claim that the legislature has, in this particular, transcended its constitutional power, should be prepared to make a strong and clear case. All doubts must fall in favor of the validity of the law." 9 Ind. at 43.

We reaffirm again now in this case our adherence to this vital principle.

In *Chicago and North Western Transportation Co.* v. *Pedersen*, (1977) 80 Wis.2d 566, 259 N.W.2d 316, the Supreme Court of Wisconsin voided a similar act which directed that mineral rights revert to the surface fee ownership if they were not registered or taxes had not been paid on them. That statute was deemed contrary to procedural due process in that the mineral interest owner was not given notice or an opportunity to be heard prior to the reversion of his interest to the surface rights owner. That court relied upon *Mullane* v. *Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and *Bell* v. *Burson*, (1971) 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. The court below took the same tack in voiding the Indiana Act.

In *Mullane, supra,* primarily relied upon by the trial court, the United States Supreme Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.
>
> * * * * * *
>
> An elementary and fundamental requirement of due process *in any proceeding* which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (Emphasis added.) 339 U.S. at 313, 314, 70 S.Ct. at 656, 657.

In *Mullane* the bank petitioned a court for settlement of an account of a trust fund, and the sufficiency of publication notice to beneficiaries was the issue. Notice was due to the beneficiaries because a tribunal was about to adjudicate upon their property. The Mineral Lapse Act in contrast is self-executing and does not contemplate an adjudication before a tribunal before a lapse occurs. When the statutory conditions exist the lapse occurs. *Mullane* does not support the trial court conclusion that notice and hearing are due to a mineral interest owner prior to the occurrence of an extinguishment.

Bell v. *Burson, supra,* relied upon by the trial court does not support the conclusion either. There a Georgia law provided that the drivers license of an individual motorist involved in an accident is to be automatically suspended without notice or hearing if security was not posted to cover the damages claimed by aggreived parties in the accident reports. In the course of

holding this system violative of procedural due process the court specifically noted:

> "If the statute barred the issuance of licenses to all motorists who did not carry liability insurance or who did not post security, the statute would not, under our cases, violate the Fourteenth Amendment. (Citations omitted.) It does not follow, however, that the amendment also permits the Georgia statutory scheme where not all motorists, but rather only motorists involved in accidents, are required to post security under penalty of loss of the licenses." 402 U.S. at 539, 91 S.Ct. at 1589.

Thus, even in *Bell,* a case involving a different complex of social concerns, there is this language supportive of the Act under consideration. It would support as consistent with procedural due process a legislative enactment which declared no more than that all licenses issued by the state would cease to be valid on a date certain in the future unless proof of financial responsibility were filed. Cf. *Frost & Frost Trucking Co.* v. *Railroad Commission,* (1926) 271 U.S. 583, 46 S.Ct. 605, 70 L.Ed. 1101. Such a hypothetical statute would be very similar in operation to the Act being questioned in this case.

[3] The Act under question does not provide for any adjudicatory process by a court or administrative agency. The absence of such a provision is not, we think, invalidating. The Act simply spells out the conditions which when existing mandate the extinguishment of an interest. If a court should be called upon to determine whether such conditions arose in a particular case so as to have effected the loss of an interest, the owner of such interest would be entitled to notice and an opportunity to be heard. Prior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two year opportunity to prevent those conditions from occurring by filing a statement of claim. *Anderson Na-*

tional Bank v. *Luckett,* (1944) 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692. That procedure is both simple and inexpensive. Based upon the foregoing analysis we do find the case of *Chicago & North Western Transportation Co.* v. *Pedersen, supra,* persuasive.

The reasoning of the trial court and the cases relied upon by it do not warrant the conclusion that the Act is unconstitutional because it fails to afford notice and hearing to mineral interest owners required by procedural due process.

[4,5] The trial court also concluded that the extinguishment of mineral interests under the Act constituted a taking of property without due process of law. Judge Young for the Fourth District Court of Appeals summarized the due process analysis applicable here in *Foreman* v. *State ex rel. Department of Natural Resources,* (1979) Ind. App., 387 N.E.2d 455:

> "The government has the inherent power or 'police power' to enact laws, within constitutional limits, to promote order, safety, health, morals, and the general welfare of society. . . . Property rights are not absolute and may be restricted by legislation which constitutes a proper exercise of the State's police power. . . . Legislation is a proper exercise of the police power when the collective benefit to the general public outweighs the restraint imposed. . . The methods or means used to protect the public order, health, morals, safety or welfare must have some reasonable relation to the purpose or end sought." 387 N.E.2d at 460.

Study of this Act reveals that its outstanding feature is its declaration that mineral interest are terminable. Whatever may be the exact legal dimensions of such interests, they are not greater than fee simple titles. Under the statute of limitations and the law of adverse possession a fee simple title to land is terminable. The Mineral Lapse Act can be viewed as vesting legal title in the owner of the surface rights which is free of the

mineral servitude when the conditions required by it exist. A statute of limitations vests legal title in an adverse possessor as against the true legal owner when the conditions required by it exist. *Brown* v. *Anderson,* (1883) 90 Ind. 93. Statutes of limitation are statutes of repose founded upon a rule of necessity and convenience and the well-being of society. *Chase Securities Corp.* v. *Donaldson,* (1945) 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628. This Act is also based upon the same rule. Cf. *Love* v. *Lynchburg National Bank and Trust Co.,* (1965) 205 Va. 860, 140 S.E.2d 650. We do not disregard the distinctions between the two types of statutes. The element of possession is different. No cause of action has arisen in the owner of the mineral interest which is required to be prosecuted. Given these differences and aforementioned similarities, we believe that this Act is, according to its principal intent and effect, and for the purpose of constitutional analysis, analogous to acts of limitation which vests title to real and personal property.

[6] Acts of limitation are not per se unconstitutional as impairing the obligation of contracts or as denying a person property without due process of law. This is so even though they extinguish the right of the party having a true title and vest a perfect title in the adverse holder. *Hawkins* v. *Barney's Lessee,* (1831) 5 Pet. 457, 8 L.Ed. 190, is an early case upholding the validity of a seven year limitation upon actions to recover possesion of land in Kentucky. In the course of that opinion it is said:

> "It is argued, that limitation laws although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and all law; it existed in a state of nature, and is only modified by society, according to the discretion of each community."

The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer or right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act.

[7,8] In *Terry* v. *Anderson,* (1877) 95 U.S. 628, 24 L.Ed. 365, Chief Justice Waite stated the general rule regarding the manner in which statutes of limitation are received by courts:

> "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the comencement of an action before the bar takes effect. . . .
>
> In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of government, unless a palpable error has been committed." 95 U.S. at 632-633.

Indiana is in accord with the rule stated and the reasoning behind it. *Guthrie* v. *Wilson,* (1959) 240 Ind. 188, 162 N.E.2d 79; *Sansberry* v. *Hughes,* (1910) 174 Ind. 638, 92 N.E. 783. In *Terry* the court held that the period of nine months and seventeen days given to sue upon a cause of action was not unconstitutional. In *Turner* v. *People of State of New York,* (1897) 168 U.S. 90, 18 S.Ct. 38, 42 L.Ed. 392, a statute declaring that past sales and conveyances by a comptroller for nonpayment of taxes would be conclusively presumed regular six months after the effective day of the statute was upheld as providing a reasonable period for bringing an action. Pursuant to Ind.Code § 32-5-11-4, owners of mineral interests are granted a minimum of two years in which to act to preserve their interests. Such a period of grace would constitute a reasonable time as contemplated by these cases.

In *Wilson* v. *Iseminger,* (1902) 185 U.S. 55, 22 S.Ct. 573, 46 L.Ed. 804, the United States Supreme Court upheld a statute which barred actions to recover ground rents and extinguished totally the right to recover further such rents, after twenty-one years had expired during which no declaration or acknowledgment of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after the passage of the act. The court held that the act gave a reasonable time to the owners of the ground rents for preserving their rights. This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration.

[9] The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this Act is within the police power of the states and does not unconstitutionally impair the obligation of contracts.

[10] The trial court's judgment is arguably based upon the conclusion that the statute effectuates a taking of property without just compensation contrary to the mandate of Art. I, §

21, of the Indiana Constitution. We agree with appellant that extinguishment of mineral interest under this statutory scheme does not involve an exercise by the State of its power of eminent domain. The State through this statute is not actually taking the mineral interest for its own use and benefit. Consequently, Art. I, § 21, does not provide an applicable standard for review of this statute. *Buckler* v. *Hilt,* (1936) 209 Ind. 541, 200 N.E. 219; *Foreman* v. *State ex rel. Department of National Resources, supra.* Appellees point to *Evansville & Crawfordsville R. R. Co.* v. *Dick,* (1857) 9 Ind. 433, in which this Court stated:

> "[T]he legislature have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner." 9 Ind. at 436.

This statement in context gave support to the court's ruling that the power of eminent domain cannot serve as a source of immunity from suits for damages for injury to private property. The Mineral Lapse Act does not involve the injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain. It declares instead that a lapse of a mineral interest will occur in the event of specified conditions and circumstances. We are satisfied that substantive due process provides the proper standard for constitutional review of it.

[11] Appellant next contends that the trial court erred in concluding that the Act is violative of the guarantees of Art. I, § 23, of the Indiana Constitution and the Fourteenth Amendment of equal protection of the law by reason of the special treatment afforded certain owners of mineral interests described in Ind.Code § 32-5-11-5. That provision states:

> "Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within sixty days after receiving actual knowledge that such mineral interest had lapsed."

By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the Legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind.Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals. Minerals exist within the earth in strata and informations which do not necessarily coincide with the manner in which man as chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and profitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble such interests and actually

produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objectives of the enactment and is consequently not contrary to the requirements of state and federal equal protection.

[12] The Act seeks to remedy a situation though to retard economic activity vital to the welfare of local communities and the general public as well. The classification erected does not involve a suspect classification or an impingement upon the exercise of a fundamental right, and consequently the traditional fair and substantial relation test is applicable to it. *Johnson et al.* v. *St. Vincent Hospital, Inc. et al., Inc.*, 404 N.E.2d 585 (1980); *Steup, et al.* v. *Indiana Housing Authority, Ind.*, 402 N.E.2d 1215 (1980). In this area of economic and social concern, legislative choices are entitled to a large degree of deference from the court. They are not required to be made with mathematical precision or along entirely logical lines. *Williamson* v. *Lee Optical of Oklahoma,* (1955) 348 U.S. 483, 487, 75 S.Ct. 461, 464, 99 L.Ed. 563; *Indiana Aeronautics Com'n* v. *Ambassadair Inc.*, (1977) 267 Ind. 137, 368 N.E.2d 1340.

> "In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, e.g. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U.S. 42, 423, [72 S.Ct. 405, 407, 96 L.Ed. 469] (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *City of New Orleans* v. *Dukes,* (1976) 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511.

There has been no demonstration made which convinces us that the classification of Ind.Code § 32-5-11-5 is invidiously discriminatory or wholly arbitrary.

The judgments of the trial court here appealed from declaring the statute unconstitutional are reversed and the cases remanded to the trial court for enforcement of the Act.

GIVAN, C. J., and HUNTER, PRENTICE and PIVARNIK, JJ., concur.

APPENDIX B

(Opinion of Trial Court)

STATE OF INDIANA

SS:

COUNTY OF GIBSON

IN THE GIBSON CIRCUIT COURT

Cause No. C-77-248

Louise F. Short

vs.

Texaco, Inc.
Robert Braselton
Electra Fields
Charles Braselton
Robert E. Brazelton
Clifford M. Braselton
Osborne T. Brazelton, Jr.
David Burkhart
D.W. Mayhew, d/b/a Mayhew Oil
And Gas Developments
DeBeers Diamond Investment, LTD.

JUDGMENT ENTRY

(Filed September 18, 1978)

Comes now the plaintiff, by counsel, and come now the defendants, by counsel, and this matter having been submitted to the Court on the Stipulation of Facts and the Pre-trial Order of the Court dated July 28, 1978, and the parties having extensively briefed the legal issues involved, same now comes on for judgment by the Court, without the intervention of a jury.

And now the Court finds:

1. The Court has jurisdiction of the parties and subject matter.

2. The Attorney General of the State of Indiana has been duly notified of the claimed unconstitutionality of Indiana Code 1971, Section 32-5-11-1, *et seq,* and has appeared and filed brief herein.

3. The Stipulation of Facts, filed herein, is hereby adopted by the Court as the Court's Finding of Fact.

4. Indiana Code 1971, Section 32-5-11-1, *et seq,* being the so-called Indiana Mineral Lapse Statute, is unconstitutionally defective and is violative of the following Sections of the Indiana Constitution:

a. Article I, Section 21, providing:

> "No man's property shall be taken by law without just compensation".

b. Article I, Section 23, providing:

> "The General Assembly shall not grant to any citizens or class of citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens."

c. Article I, Section 24, providing:

> "No ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

5. Indiana Code 1971, Section 32-5-11-1, *et seq,* being the so-called Indiana Mineral Lapse Statute, is unconstitutionally defective and is in violation of the following provisions of the Constitution of the United States of America:

a. As to the Fifth Amendment to the Constitution of the United States of America reading:

"No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

b. Section 1 of the Fourteenth Amendment to the Constitution of the United States of America providing:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law."

6. The constitutional defects of the state in question go to the very heart of the statute and therefore the entire statute is unconstitutional, void and of no effect.

7. The Court adopts, by reference, its reasoning as to unconstitutionality the memorandum opinion entered July 24, 1978 in *Pond et al* v. *Walden, et al,* being Cause Number C-78-1 in this Court.

The Court having stated its Findings of Facts now states its Conclusions of Law:

A. Indiana Code 1971, Section 32-5-11-1, *et seq,* being the so-called Indiana Mineral Lapse Statute, is unconstitutional in its entirety and is therefore void and of no effect.

B. The plaintiff, Louise F. Short, is the owner of the following described real estate, situated in Gibson County, Indiana, to-wit:

The east half of the southwest quarter of Section 29, Township 2 South, Range 11 west, containing 80 acres, more or less.

ALSO, a part of the west half of the southwest quarter of Section 29, Township 2 south, Range 11 west, and more particularly described as follows:

Beginning at the northeast corner of said half quarter section and running thence south 104 rods; thence west of the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, and containing 52 acres, more or less,

and containing in all 132 acres, more or less.

(herein called the "Real Estate"), subject to the following:

C. An undivided one-half (½) interest in and to all of the "oil, gas and other minerals, except coal, that may be produced from" the Real Estate, "together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas and other minerals and storing, handling, transporting and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements." Said interest being subject to all of the terms and conditions of a "Mineral Deed" recorded April 23, 1942 in Deed Record Book 115, at page 197, in the Office of the Recorder of Gibson County, Indiana, which Mineral Deed interest is now vested in the defendant, Texaco, Inc.

D. An undivided one-sixth (1/6th) interest in and to all of the oil, gas and other minerals, except coal, that may be produced from the Real Estate, said interest being subject to all of the terms and conditions of a Mineral Deed dated July 7, 1944 and recorded in Deed Record 120, at page 17, in the Office of the Recorder of Gibson County, Indiana, which interest is now vested in the defendants, O. T. Brazelton, Jr., and Robert E. Brazelton.

E. An undivided one-thirty-second (1/32nd) interest in and to all of the oil, gas and other minerals, except coal, that may be

produced from the Real Estate, said interest being subject to all of the terms and conditions of a Mineral Deed dated July ____, 1944 and recorded in Deed Record 120, at page 46, in the Office of the Recorder of Gibson County, Indiana, which interest is now vested in the defendants, Robert E. Brazelton, Charles Brazelton, Chester Brazelton, Clifford Brazelton, O. T. Brazelton, Jr., John P. Brazelton and Rosa G. Burkhart.

F. An undivided two-sixteenth (2/16th) interest in and to all of the oil, gas and other minerals, except coal, that may be produced from the Real Estate, said interest being subject to all of the terms and conditions of a Mineral Deed dated July ____, 1944 and recorded in Deed Record 120, at page 46, in the Office of the Recorder of Gibson County, Indiana, which interest is now vested in the defendants, Robert E. Brazelton.

G. The defendant, D.W. Mayhew, d/b/a Mayhew Oil and Gas Development, is the Lessee of an oil and gas lease from the defendants, Texaco, Inc., John P. Brazelton and Jane E. Brazelton, Charles Brazelton, *et ux,* and Clifford Brazelton, *et ux,* Robert E. Brazelton, *et ux,* Clifford Brazelton and Ellen Brazelton and O.T. Brazelton, a/k/a O. T. Brazelton, Jr., which oil and gas leases are recorded as follows:

(a) In Drawer 2, Card 9155

(b) In Drawer 2, Card 9370

(c) In Drawer 2, Card 9071

(d) In Drawer 2, Card 9072

(e) In Drawer 2, Card 9073

(f) In Drawer 2, Card 9074

in the office of the recorder of Gibson County, Indiana, which oil and gas leases are valid and subsisting as relates to the Real Estate.

H. The plaintiff should pay the costs of this action.

IT IS, THEREFORE, CONSIDERED, ORDERED, ADJUDGED AND DECREED that judgment herein be entered in accordance with the aforementioned Findings of Facts and Conclusions of Law and that plaintiff take nothing by her complaint, that defendants are entitled to relief as set forth herein and that the plaintiff pay the costs of this action.

/s/ Walter Palmer, Judge, Gibson
Circuit Court

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APPENDIX C

(Judgment Appealed From)

STATE OF INDIANA

SS:

COUNTY OF GIBSON

IN THE GIBSON CIRCUIT COURT
1978 TERM

Cause No. C-78-17

Order Entry, July 25, 1978

Eden H. Pond, Edna H. Bobe, Consolidation Coal Co.

v.

Ulysses G. Walden Jr., Carolyn Sallee Walden

MEMORANDUM OPINION AND JUDGMENT ON AGREED CASE
(Filed July 24, 1978)

This case comes before this Court upon the Submission of an Agreed Case by the parties herein, pursuant to Indiana Code 1971, Sections 34-1-29-1 *et seq.*, with the necessary facts and Record, as defined in that statute. It is believed reiteration of the facts or of the Record are unnecessary except for reference.

The Trial Court wishes to express its gratitude to counsel for Plaintiffs, Defendants, Attorney General of the State of Indiana and Intervenor for their scholarly Briefs in this complicated legal issue.

The essential decision necessary in this case is to determine whether or not the so-called Indiana Mineral Lapse Statute, being I.C. 1971, 32-5-11-1 *et seq.* is constitutionally acceptable. If as contended by plaintiff it is unconstitutional, then plaintiff will prevail by judgment. If constitutional, there must necessarily be judgment for the defendants.

This Court feels that a short statement of matters of concern by way of Memorandum may be helpful to those affected by this Decision, as well as those reviewing the action of this Court.

It cannot be rationally doubted that the State of Indiana reserves the right inherent in this organized society to act in the public welfare, even to the extent of impairment of private contract. *Home Building and Loan* v. *Blaisdell,* (1934) 290 U.S. 398. As a general proposition of Constitutional Law, however, this Court believes the U.S. Supreme Court normally will abstain upon issues relating to the contract laws of the individual States. However, there are discussions in cited cases as to the principles, *Blaisdell, supra.*

It should be noted in the Agreed Facts of this case that we are not discussing an issue of murky titles, or long-lost owners of interests. There is no "cloud" on the title to this real estate, except to the extent that the Statute challenged poses such a cloud. This Statute *creates* a challenge to vested property rights, by the statutory terms of non-use or failure to register. At Common Law, there could be no termination in mineral rights as a separate estate from the fee. The question then becomes, first: can the Indiana Legislature create such a challenge, and second: has the Legislature in this Statute done so in a Constitutionally acceptable manner.

This Court does not question that the Legislature had a valid purpose in passage of this Statute, i.e., exploitation of the State's energy sources, but the method chosen is believed to be unconstitutional.

As stated, very scholarly arguments are advanced for the proposition that the Statute is Constitutional. All of these arguments fail to answer the basic inequitable result in this case, that a judgment for the surface rights owners would give them a demonstrably valuable asset in derogation of their contractual purchase, with no notice to the mineral rights owners, and no compensation to the valid owners for their loss.

Suppose the State of Indiana had been the takers of these rights from the mineral owners for distribution to some one who would exploit them, arguably for the common good. Would not Constitutionally there be a requirement of notice to the mineral owners, a right of hearing, some form of compensation, as, for example, the tax sale of real estate?

It seems clearly the law in this Country that before property rights can be taken from persons, these persons have some rights as to notice and hearing. The subject matter would govern what procedural requirements are involved, but Constitutionally it would seem the hearing would revolve around the facts essential to determination of the controversy. *Bell* v. *Burnson* (1971), 402 U.S. 535; *Mullane* v. *Central Hanover Bank and Trust Co.* (1950) 339 U.S. 306; *Goldberg* v. *Kelley* (1970), 397 U.S. 254.

Another unresolved question is, what harm would result had the statute required notice been given the mineral owners prior to the drastic severage and delivery of ownership from the mineral owner to the surface owner, at least such notice as is contemplated in *Mullane, supra?* It would perhaps induce litigation, but one queries whether that is not already the case with the statutory framework existing. The notice provision in I.C. 1971, 32-5-11-6 would seem just as precipitating a rule as would be notice prior to the legislature taking. Expediency is not always justice, whether the end sought is laudable or not.

For the reasons stated herein, this Court finds, Indiana Code, 1971 32-5-11-1, *et seq.* being Acts 1971, P.L. 423 is unconstitutional, void and of no effect.

This Memorandum of Opinion constitutes the Findings of Fact and The Conclusions of Law of This Court.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that there be judgment for the Plaintiffs herein and against the Defendants, that Plaintiffs shall recover their costs expended, that Plaintiffs, Eden H. Pond and Edna H. Bobe, are declared to be the equal owners as tenants in common of the mineral rights in the real estate in question pursuant to the Agreed Facts, and Consolidation Coal Company is the holder of a valid and subsisting lease covering said interests.

Judgment accordingly.

/s/ WALTER H. PALMER, JUDGE
GIBSON CIRCUIT COURT

STATE OF INDIANA

SS:

COUNTY OF GIBSON

IN THE GIBSON CIRCUIT COURT
1980 Term

Cause No. C-77-248

In Re
Louise F. Short

v.

Texaco, Inc., *et al,*

ORDER
(October ____, 1980)

Comes now the plaintiff by counsel and come also the defendants by counsel, and the Court now takes judicial notice of the opinion of the Supreme Court of Indiana issued in this cause on June 23, 1980, which opinion is in the words and figures following, to-wit:

(H.I.)

and also takes judicial notice of the denial of Appellees' petition for rehearing issued in this cause on September 24, 1980.

And now the Court, having reconsidered the stipulated facts and issues in this cause in accordance with the foregoing, does now vacate the judgment heretofore entered and in lieu thereof enters the following conclusions of law and judgment:

Conclusions of Law

1. The statements of claim of mineral interest filed on June 9 and June 17, 1977, by certain of the defendants did not preserve

the interest of said defendants, or any of them, from extinction or lapse under Public Law 423, Acts of the Indiana General Assembly of 1971.

2. Plaintiff's failure to give notice to John P. Braselton and Gwendolyn Burkhart of the lapse of their interests did not preserve the interests of said defendants, or any of them, from extinction or lapse under Public Law 423, Acts of the Indiana General Assembly of 1971.

3. The issuance of the oil and gas leases described in paragraph 18 of the Stipulation of Facts did not preserve the interests of the defendants, or any of them, from extinction or lapse under Public Law 423, Acts of the Indiana General Assembly of 1971.

4. As applicable to the facts of this case, Public Law 423, Acts of the Indiana General Assembly of 1971, is constitutionally valid and enforceable under the Constitutions of both the State of Indiana and the United States of America, and, in accordance with the provisions of said Act, plaintiff is entitled to the relief prayed for in plaintiff's Complaint for Declaratory Judgment.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the mineral intersts described and referred to in numbered paragraphs 2, 3, 4, 5, 6, 7 and 10, of the Stipulation of Facts heretofore filed herein, be and the same are hereby declared to be permanently and absolutely lapsed and extinguished.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, LOUISE F. SHORT, has succeeded to said interests as the present owner of the interest out of which said mineral interests were carved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the oil and gas leases described in

numbered paragraph 11 of the Stipulation of Facts in favor of D. W. Mayhew d/b/a Mayhew Oil and Gas Development are invalid and ineffective by reason of prior extinguishment of the Lessors' mineral interests.

IT IS FURTHER ORDERED by the Court that the defendants shall pay the costs of this action.

/s/ WALTER PALMER
Judge, Gibson Circuit Court

APPENDIX D

(Denial of Petition for Rehearing)

(Received September 26, 1980)

STATE OF INDIANA

Clerk of the Supreme Court
and Court of Appeals

Majorie H. O'Laughlin, Clerk
217 State House

No. 179S23 and 1278S303
Louise F. Short v. Texaco, Inc., et al
State of Indiana, et al v. Eden H. Pohd, et al

You are hereby notified that the Supreme Court has on this day denied Appellee's Petition for Rehearing. Givan, C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 24th day of September, 1980

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and Court of Appeals

Hall, Partenheimer & Leucking, Princeton
Mark W. Rietman, Evansville
Charles R. Nixon, Princeton
Johnson, Carroll & Griffith, Evansville
Fine, Hatfield, Sparrenberger & Fine, Evansville

APPENDIX E

(Notice of Appeal)

IN THE
SUPREME COURT OF INDIANA

No. 179 S 23

Louise F. Short,
Appellant,

v.

Texaco, Inc., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Brazelton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D.W. Mayhew, d/b/a Mayhew Oil and Gas Development, DeBeers Diamond Investment, Ltd.,
Appellees,

State of Indiana,
Intervenor.

Appeal from the Gibson Circuit Court
The Honorable Walter H. Palmer, Regular Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed November 17, 1980)

Notice is hereby given that Texaco, Inc., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Brazelton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, DeBeers

Diamond Investment, Ltd., Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Indiana reversing the judgment of the trial court, entered in this action on September 24, 1980.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph two (2).

Dated this 17th day of November, 1980.

/s/ John L. Carroll (a Member of the Bar of the United States Supreme Court)

For Appellees, Texaco, Inc., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Braselton, Clifford N. Braselton, Osborne T. Braselton, Jr., David E. Burkhart, John P. Braselton, Rosa G. Burkhart, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, DeBeers Diamond Investment, Ltd.

JOHN L. CARROLL
Johnson, Carroll and Griffith, P. C.
2230 W. Franklin Street
P.O. Box 6016, Station B
Evansville, Indiana 47712 (#35)

Certificate of Service

JOHN L. CARROLL, being first duly sworn, upon his oath, says:

1. That he is the Attorney of record for the Appellants in the above entitled cause.

2. That on or before the 3rd day of December, 1980, he served upon the opposing counsel in the above entitled cause, the following:

Notice of Appeal to the Supreme Court of the United States

by depositing the same in the United States Mail, certified mail, return receipt requested, postage paid, at Evansville, Indiana, properly addressed to:

Verner P. Partenheimer, Jr.
Attorney at Law
219 North Hart Street
P.O. Box 313
Princeton, Indiana 47670

James M. Buthod
Attorney at Law
Suite 409, Citizens Building
115 Southeast Third Street
Evansville, Indiana 47708

Charles R. Nixon
Attorney at Law
223 West State Street
Princeton, Indiana 47670

Theodore Sendak
Attorney General
State of Indiana
State House
Indianapolis, Indiana 46204

/s/ John L. Carroll

SUBSCRIBED AND SWORN TO before me, a Notary Public in and for said County and State, this 3rd day of December, 1980.

Anne V. Finck, Notary Public
County of Residence: Vanderburgh

My Commission Expires:
August 1, 1981

JOHNSON, CARROLL & GRIFFITH, P.C.
2230 West Franklin Street
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Telephone: (812) 425-4466 (#36)

APPENDIX F

(The Indiana Dormant Mineral Interests Act) I.C. 32-5-11-1 et seq.

32-5-11-1 [46-1808]. Lapse of mineral interest—Prevention.—Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32-5-11-5] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved. [IC 32-5-11-1, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-2 [46-1809]. Mineral interest—Definition.—A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals. [IC 32-5-11-2, as added by Acts 1971, P.L. 423, § 1.]

32-5-11-3 [46-1810]. Use of mineral interests—Definition.—A Mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all right granted by such instrument. [IC 1971, 32-5-11-3, as added by Acts 1971, P.L. 423, § 1, p. 1970.]

32-5-11-4 [46-1811]. Statement of claim—Filing—Requirements.—The statement of claim provided in section one [32-5-11-1] above shall be filed by the owner of the mineral interest prior to the end of the twenty [20] year period set forth in section two [one] [32-5-11-1] or within two [2] years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed. [IC 1971, 32-5-11-4, as added by Acts 1971, P. L. 423, § 1, p. 1970; 1972, P. L. 11, § 15, p. 336.]

32-5-11-5 [46-1812]. Extinguishment of mineral interest—Exceptions.—Failure to file a statement of claim within the time provided in section 4 [32-5-11-4] shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four [32-5-11-4], the owner of ten [10] or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten [10] years prior to the expiration of the period provided in section 4 [32-5-11-4] preserve other mineral intersets, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within sixty [60] days after publication of notice as provided in section seven [32-5-11-7] herein, if such notice is published, and if no such notice is publied, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed. [IC 1971, 32-5-11-5, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-6 [46-1813]. Successor in interest—Notice requirements—Prima facie evidence.—Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten [10] days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given. [IC 1971, 32-5-11-6, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-7 [46-1814]. Statement of claim—Filing—Recorder's duty.—Upon the filing of the statement of claim, provided for in section 4 [32-5-11-4] of this chapter or the proof of service of notice as provided in section seven [six] [32-5-11-6] of this chapter in the recorder's office for the county where such interest is located, the recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice. [IC 1971, 32-5-11-7, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

32-5-11-8 [46-1815]. Waiver of chapter's provisions—Time limit.—The provisions of this chapter [32-5-11-1—32-5-11-8] may not be waived at any time prior to the expiration of the twenty [20] year period provided in section 1 [32-5-11-1]. [IC 1971, 32-5-11-8, as added by Acts 1971, P. L. 423, § 1, p. 1970.]

APPENDIX G

(C. & N.W. vs. Pedersen)

80 Wis.2d 566

Chicago And North Western Transportation Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Respondents,

v.

Earl H. Pedersen, Register of Deeds in and for Bayfield County, Wisconsin, and Victor A. Miller, Attorney General of Wisconsin, and all other officers similarly situated in and of this state and those acting under said officers, Appellants.

No. 75-702.

Supreme Court of Wisconsin.

Argued Oct. 4, 1977.

Decided Nov. 14, 1977.

DAY, Justice.

This is an appeal from a declaratory judgment in which the trial court held secs. 700.30 and 893.075, Stats. (Ch. 260, L.1973) unconstitutional and enjoined all Wisconsin county registers of deeds from carrying out the provisions of the act. We affirm the judgment of the trial court.

Sec. 700.30, Stats., at issue here, reads as follows:

"700.30 *Mineral Rights.* (1) Any person, other than the surface fee owner, who claims title to mineral rights in land arising from an instrument other than a lease from the surface fee owner of 10 years' duration or less which by its terms is in full force and effect, shall record his claim with the register of deeds of the county in which the land is situated. The claim shall

describe the reserved rights and the land in which the rights are claimed. The register of deeds shall record the claim in a register of mineral rights and the claimant shall pay the recording fee under s. 59.57. In addition, the claimant shall thereafter pay an annual registration fee of 15 cents per acre or fraction thereof with a minimum fee of $2 for each single description registered on the lands wherein such mineral rights are claimed. Failure to register any claim of mineral rights shall result in reversion of such rights to the surface fee owner. Failure to pay the registration fee within 3 years of the annual due date shall cause all rights to revert to the surface fee owner.

"(2) Any claim of mineral rights separate from surface fee ownership arising from an instrument other than a lease from the surface fee owner of 10 years' duration or less which by its terms is in full force and effect, and recorded prior to December 31, 1974, shall be void and all rights under such claim shall revert to the surface fee owner unless such claim is recorded prior to December 31, 1977, as provided in this section. Claims of mineral rights separate from surface fee ownership arising from instruments recorded after December 31, 1974, must be recorded as provided in this section within 3 years of the date of recording the instrument creating or reserving such rights; failure to record such claims shall void such claims, which shall then revert to the surface fee owner.

"(3) Mineral rights, other than mineral rights claimed by the surface fee owner of record, may not be claimed unless based on a recorded instrument which shall be specifically referred to in the registration of such rights required by this section.

"(4) Of the annual registration fee, one-third shall go to the county in which the land is located, one-third to the municipality in which the land is located and the remaining one-third to the geological and natural history survey to be used for identification and evaluation of mineral resources of the state. The register of deeds shall collect such payments and maintain

records sufficient to identify delinquencies in payments and he shall turn the payments over to the county treasurer who shall forward the payments to those entitled to them under this subsection no later than February 28 of the year following the due date.

"(5) Municipalities and counties shall register all lands owned by them on which they claim mineral rights but shall not be required to pay a fee. Lessees of mineral rights on lands owned by counties or municipalities shall be required to pay the fee under sub. (1).

"(6) If the fee under this section is not paid on or before the due date of December 31 of each year, it will be subject to the interest rate under s. 71.13(1) accruing from the preceding December 1."

Sec. 893.075, Stats. reads as follows:

"893.075 *Adverse Possession Of Mineral Rights Defined.* Adverse possession of the land as defined in this chapter shall be deemed to include adverse possession of all mineral rights not registered under s. 700.30.

"*Section 2. Effective Date.* The first registration fee under this act shall be paid for the year 1974 and shall be paid not later than December 31, 1974. On enactment hereof, the attorney general shall promptly commence an action seeking a declaratory judgment regarding the constitutionality of this act."

Sec. 700.30, Stats. requires persons, other than surface fee owners and lessees holding leases of less than ten years, who claim title to mineral rights in land, to record their claims and pay a recording fee. Non-exempt claimants are also required to pay an annual registration fee of fifteen cents for each acre of mineral rights claimed. Failure to record claims of mineral rights or pay the annual registration fee results in reversion of the mineral rights to the surface fee owner.

The plaintiff-respondent railroad companies (hereinafter plaintiffs) claim in excess of 250,000 acres of severed mineral rights in Wisconsin, including claims in Bayfield county. The plaintiffs started a declaratory judgment action to have the statutes declared unconstitutional and to have their enforcement enjoined.

Following a hearing, the trial court issued a memorandum opinion holding the statutes were unconstitutional as violating the due process and equal protection clauses of the United States Constitution, and the uniformity of taxation clause of the Wisconsin Constitution.

Judgment was entered January 12, 1976 declaring Ch. 260 of the Laws of 1973 unconstitutional in its entirety and permanently enjoining the defendant-respondent registers of deeds (hereinafter defendants) from carrying out its provisions.

We hold that sec. 700.30, Stats., is unconstitutional because its enforcement provisions deny procedural and substantive due process.[1] The enforcement provisions in the statute are not severable from the statute as a whole so the entire statute fails.[2]

Sec. 700.30, Stats. provides that owners of severed mineral rights may lose those rights to the surface owners under a number of circumstances more fully described below.

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[1] The plaintiffs claim a denial of due process under both the state and federal constitutions. "...Art. I, Sec. 1 of the Wisconsin Constitution is . . . substantially equivalent to the due-process and equal protection clauses of the Fourteenth Amendment to the United States Constitution." *State ex rel. Sonneborn* v. *Sylvester*, 26 Wis.2d 43, 49, 132 N.W.2d 249, 252 (1965). *State ex rel. Cresci* v. *H & SS Dept.*, 62 Wis.2d 400, 414, 215 N.W.2d 361 (1974).

[2] The plaintiffs also argue that the statute denies equal protection and offends Art. VIII, Sec. I of the Wisconsin Constitution. The latter section requires that property taxes be uniform. We do not reach these issues.

[1] Mineral rights are an interest in land which may be created or transferred as any other estate in land. *Gillett and another* v. *Treganza,* 6 Wis. 343, 348 (1858); *Ganter and others* v. *Atkinson and others,* 35 Wis. 48, 51 (1874).

Where the mineral right is severed from the surface fee

> ". . . it has been held to be property, distinct from the land itself vendible, inheritable and taxable." *Elder* v. *Wood,* 208 U.S. 226, 232, 28 S.Ct. 263, 264, 52 L.Ed. 464 (1908).

[2] Before a person may be deprived of property, that person has a right to a hearing. The requirements of the hearing will vary from case to case depending on the nature of the right or property threatened, but the hearing must allow for consideration of facts essential to the decision. *Bell* v. *Burson,* 402 U.S. 535, 540-542, 91 S.Ct. 1586, 29 L.Ed. 90 (1971).

In this case, the plaintiffs' mineral rights will revert to the surface owner if they are not registered or taxes are not paid on them. At the least, the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid.

[3,4] Implicit in the right to a hearing is adequate notice of the hearing. Personal service is always sufficient notice. *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Where a person's location is known or easily ascertainable personal service is also required. *Shroeder* v. *City of New York,* 371 U.S. 208, 212, 213, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962). But for, ". . . persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits . . ." For such persons publication is adequate notice. *Mullane, supra,* at 339 U.S. 306, 317, 70 S.Ct. at 658.

In an in rem proceeding for the collection of property taxes the standards for the required notice are less stringent. In *Devitt* v. *Milwaukee,* 261 Wis. 276, 52 N.W.2d 872 (1952), the City of Milwaukee adopted an ordinance in conformity with sec. 75.521, Stats. which allowed for the enforcement of property taxes by an in rem action where tax certificates remained unpaid for over three years. The procedure set out in the act required that a petition of foreclosure be filed with the circuit court and that the petition would have the same effect as a lis pendens. A copy of the petition would be sent by registered mail to the last known addresses of owners and mortgagees and notice of the petition would appear in the city newspaper with the largest circulation once a week for three weeks. In deciding that the procedure complied with due process, this court stated that,

> "The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain." *Devitt, supra,* at 261 Wis. 276, 52 N.W.2d at 873, quoting from *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U.S. 232, 239, 10 S.Ct. 533, 33 L.Ed. 892 (1890).

The payment of the fees under sec. 700.30, Stats. is a tax. The fees raise revenues beyond what is necessary to the administration of the registration scheme. Sec. 700.30(4), Stats. provides that one-third of the fees will go the state geological and natural history survey.[3] In contrast to the notice procedure approved in *Devitt, supra,* nothing in sec. 700.30, Stats. provides for any procedural due process. Therefore, the law unconstitutionally allows for the deprivation of property without due process.[4]

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[3]All the parties to this appeal agree that the registration fees are a tax.

[4]The attorney general contends that the act itself is notice. There is no authority for that argument which is a novel approach to the problem of notice. The attorney general also contends that there is nothing that needs to be decided at a hearing. As was pointed out above, a severed mineral rights owner may want to at least raise the factual issues of whether the registration was done or the tax paid.

The attorney general contends that if the statue lacks procedural due process, this court should formulate due process safeguards and read them into the terms of the statute. Procedural due process requirements have been read into other statutes.[5] Because a number of alternative methods are possible, it is more fitting for the legislature to make the choice than for this court to do so.

Substantive Due Process

The plaintiffs contend that the forfeiture provisions of the statute deny them substantive due process by an unreasonable use of the police power because their mineral rights revert to the surface owners if the rights are not registered or taxes are not paid on them.

The test for a proper exercise of the police power is whether,

> ". . . the means chosen have a reasonable . . . relationship to the purpose or object of the enactment, if it has, and the object is a proper one, the exercise of the police power is valid." *State* v. *Jackman,* 60 Wis.2d 700, 705, 211 N.W.2d 480, 484 (1973).

[5] This statute not only provides for a forfeiture of unregistered mineral rights, it also provides that the forfeited rights revert to the surface owner. This procedure violates the rule that the legislature cannot take private property from one person for the private use of another. *Chicago & N. W. R. Co.* v. *Morehouse,* 112 Wis. 1, 87 N.W. 849 (1901).

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[5]In *State ex rel. Kavach* v. *Schubert,* 64 Wis.2d 612, 219 N.W.2d 341 (1974), this court held that due process required that a defendant who had been found guilty and mentally defective at the time of the crime, be given a third phase in his trial to determine if he was still mentally defective. In *Steele* v. *Gray,* 64 Wis.2d 422, 223 N.W.2d 614 (1974), due process required a hearing prior to administrative revocation of a prison inmate's good time. In *State ex rel. Johnson* v. *Cady,* 50 Wis.2d 540, 185 N.W. 306 (1971), due process required a hearing before revocation of parole.

The attorney general admits that there is a private use here, but argues that this private use is so intimately connected with the public necessity of clearing up uncertainty over mineral right ownership that there is a quasi-public use so as to justify the legislative taking of property for that purpose. *Chicago & N. W. R. Co., supra,* and 16a C.J.S. Constitutional Law § 647a, pp. 940-941. The attorney general's argument is unpersuasive. First, it's questionable whether the purpose of clearing up mineral title uncertainty is so important that the reversion of mineral rights to the surface owner becomes a quasi-public use. Second, in *Chicago & N. W., supra,* the private parties were given compensation for the property taken for the quasi-public use. Sec. 700.30, Stats. provides for no such compensation.

[6] Sec. 700.30, Stats. provides that severed mineral rights owners or long term lessees of mineral rights must register their mineral rights and pay a yearly registration fee on the mineral rights within three years or else the rights revert to the surface fee owner. This reversion would occur without a hearing or notice of that hearing having been given to the severed rights owner, and without compensation having been paid to them. These enforcement procedures ar entirely lacking in substantive and procedural due process.

The attorney general contends that the statute is severable because the enforcement provisions may be separated from the rest of the statute.

[7] The intent of the legislature and the viability of the severed portion of the statute when standing alone are the factors to consider when deciding whether a statute should be severed. Material provisions of a statute may be eliminated,

> "... if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not

have enacted the valid part alone." *Madison* v. *Nickel,* 66 Wis.2d 71, 79, 223 N.W.2d 865, 870 (1974). *City of Milwaukee County* v. *Boos,* 8 Wis.2d 215, 224, 99 N.W.2d 139 (1959).

Sec. 700.30, Stats. cannot stand without the objectionable enforcement provisions. Without the enforcement provisions, severed mineral rights owners would be required to register their rights and pay fees on them, but absolutely nothing would happen if they did not.

The attorney general suggests that the payment of fees could be enforced the same as other taxes on real or personal property, but that was not the legislature's intent. The legislature intended that the mineral rights would revert to the surface owner, which violates substantive due process as pointed out above. Without its enforcement procedures, sec.700.30, Stats. is not a viable law and would not have the same effect as the one intended by the legislature.

Judgment affirmed.

APPENDIX H

(Contos v. Herbst)

Allison CONTOS, *et al.*, Appellants,

v.

Robert L. HERBST, Individually, and as Commissioner of the Minnesota Department of Natural Resources, *et al.*, Respondents,

Andrew Korda, Individually, and as Auditor for St. Louis County, Respondent,

Minnesota Chippewa Tribe, Respondent.

No. 47346.

Supreme Court of Minnesota.

Jan. 26, 1979.

Rehearing Denied March 13, 1979.

Heard, considered, and decided by the court en banc.

KELLY, Justice.

In 1969 the legislature enacted Minn.St. 93.52, which required every owner of a fee simple interest in minerals which interest is owned separately from the fee title to the surface of the property [hereinafter referred to as severed mineral interests] to file for record a verified statement describing that interest with the register of deeds or the register of titles in the county where the interest is located. Minn.St. 93.52, subd. 2. The purpose of this requirement, as stated by the legislature, was:

> "* * * [T]o identify and clarify the obscure and divided condition of severed mineral interests in this state. Because

> the ownership condition of many severed mineral interests is becoming more obscure and further fractionalized with the passage of time, the development of mineral interests in this state is often impaired. Therefore, it is in the public interest and serves a public purpose to identify and clarify these interests." Minn.St. 9352, subd. 1.

Notice of the registration requirement was provided by publication of the legislation in legal newspapers within each county of the state and in two publications related to mining activities having nationwide circulation. Minn.St.1971, § 93.58.

In 1973 the legislature enacted additional legislation concerning severed mineral interests which is the basis for this action. L.1973, c. 650, art. XX hereafter referred to as mineral registration act. First, the legislature provided that anyone who failed to file the verified statement within the statutory period would forfeit that interest to the state. The only remedy for persons claiming an ownership interest at the time of forfeiture was the recovery of the fair market value of the mineral interest at the time of the forfeiture or at the time of trial, whichever is lesser. Minn.St. 93.55. The legislature found the additional legislation necessary "to provide adequate identification of [severed mineral interests] and to prevent the continued escape from taxation of obscure and fractionalized severed mineral interests." Minn.St. 272.039.

Secondly, the legislature subjected severed mineral interests not otherwise taxed to a tax of $.25 per acre per year or $2.00 per interest per year, whichever is greater. Minn.St. 272.04, subd. 1; 273.13, subd. 2a. In describing the basis for implementing the tax the legislature enacted the following:

> "The legislature finds, for the reasons stated below, that a class of real property has been created which, although not exempt from taxation, is not assessed for tax purposes and does not therefore, contribute anything toward the cost of supporting the governments which protect and

preserve the continued existence of the property. These reasons are as follows: (1) In the case of *Washburn* v. *Gregory,* 1914, 125 Minn. 491, 147 N.W. 706, the Minnesota Supreme Court determined that where mineral interests are owned separately from the surface interests in real estate, the mineral interest is a separate interest in land separately taxable, and do not forfeit if the overlying surface interest forfeits for nonpayment of taxes due on the surface interest; (2) Since this 1914 decision, mineral interests owned separately from the surface have been valued and assessed for tax purposes, as a practical matter, only if the value of the minerals has been determined through drilling and drill core analysis, and (3) The absence of any taxation of mineral interests owned separately from the surface, except where drilling analysis is available, has encouraged the separation of ownership of surface and mineral estates and resulted in the creation of hundreds of thousands of acres of untaxed mineral estate lands which thus are immune from tax forfeiture. The legislature also finds that the province of Ontario in Canada, which has land ownership patterns and mineral characteristics similar to that of Minnesota, has imposed a tax of $.50 an acre on minerals owned separately from the surface since 1968, and $.10 an acre before that. The legislature further finds that the identification of separately owned mineral interests by taxing authorities requires title searches which are extremely burdensome and, where no public tract index is available, prohibitively expensive. This result is caused in part by the decision in *Wichelman* v. *Messner,* 1957, 250 Minn. 88, 83 N.W.2d 800, where the so called '40 year law' was held inapplicable to mineral interests owned separately from surface interests. On the basis of the above findings, and for the purpose of requiring mineral interests owned separately from surface interests to contribute to the cost of government at a time when other interests in real property

> are heavily burdened with real property taxes, the legislature concludes that the taxation of severed mineral interests as provided in section 272.13, subdivision 2a is necessary and in the public interest, and provides fair taxation of a class of real property which has escaped taxation for many years * * *." Minn.St. 272.039.

Plaintiffs, owners of severed mineral interests situated primarily in northern Minnesota, brought this action seeking a declaration that the registration, forfeiture and tax provisions of the mineral registration act are unconstitutional and an injunction prohibiting their enforcement. The district court, sitting without a jury, entered findings of fact which agreed with the legislative findings quoted previously. In addition the district court incorporated in its findings a description of the history and magnitude of the severed interest phenomenon contained in an amicus brief prepared by attorney W. K. Montague for the case of *Kangas-Jacobsen Dairy, Inc.* v. *Lloyd-Smith,* 241 Minn. 317, 62 N.W.2d 915 (1954):

> "They [severed mineral interests] are of wide extent: the entire length of the Mesabi Range from Gunflint Lake * * down to Grand Rapids, to a width of probably twenty miles from the iron formation, is blanketed with mineral reservations, on each side of the east end of the Mesabi Range through Lake and Cook counties down to Lake Superior, a distance of fifty to sixty miles, nearly every forty has a mineral reservation. Large areas in Carlton and Crow Wing Counties are similarly covered. While we are not familiar with details of mineral reservations in other Northern Minnesota counties, we understand they are not uncommon. Every city and village on the Mesabi Range from Aurora through Eveleth, Virginia, Chisholm, Hibbing, down to Coleraine, is located on lands subject to mineral reservations. Every home, store, factory and farm in that area is subject thereto."

The district court's findings of fact concerning the taxation of severed mineral interests also incorporated a description contained in the amicus brief of attorney Montague:

> "In a substantial number of cases the reservations [severed mineral interests] were created as a result of the tax laws, and do not represent arm's length negotiations between parties. They represent deliberate attempts to arrange a transaction under which the grantor could retain for generations his speculative interest in the minerals without carrying charges, and, if merchantable ore should ever be discovered, could re-acquire the surface without cost."

The district court specifically found that 140,000 to 145,000 acres of the 721,640 acres of severed mineral interests owned by plaintiff United States Steel were created through a series of transactions between United States Steel and its subsidiaries whose purpose was to avoid ad valorem property taxes on property valuable primarily for its mineral potential. The district court further found that plaintiffs paid ad valorem property taxes on approximately 3,212 of their 1,262,664 acres of severed mineral interests.[1] Reference to additional findings of fact follows where appropriate.

Based on its findings of fact the district court concluded that the registration, taxation, and forfeiture provisions were constitutional but that the procedures attending the forfeiture provisions were unconstitutional. By virtue of the latter conclusion the district court further concluded that defendants be enjoined from claiming or asserting an ownership in plaintiffs' mineral interests by reason of the forfeiture procedures. Judgment was entered accordingly. Plaintiffs appeal from that part of the judgment upholding the registration, taxation and forfeiture

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[1] Of the 3,212 acres the majority were taxed at $1.00 per acre pursuant to the tax on unmined taconite. Minn.St. 298.26.

provisions; defendants appeal from that part of the judgment invalidating the procedures attending forfeiture and granting injunctive relief. We affirm the judgment of the district court in all respects.

The issues presented are the following: (1) Whether the classification of severed mineral interests for purposes of taxation violates the uniformity clause of the Minnesota Constitution; (2) whether the uniformity clause of the Minnesota Constitution requires that taxation of property be related in some way to its value; (3) whether the forfeiture provisions violate the due process clauses of the state and Federal constitutions; (4) whether the procedures attending the forfeiture provisions comport with the due process clauses of the state and Federal constitutions; and (5) whether the language governing the registration requirements is unconstitutionally vague.

[1-3] 1. The uniformity clause of the Minnesota Constitution reads in part:

> "Taxes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes * * *" Minn.Const. art. 10, § 1.

In applying that provision we have stated that the legislature has a wide discretion in classifying property for purposes of taxation.[2] Where the classification has a reasonable basis in fact, the judgment of the legislature will not be disturbed. See *Johnson* v. *Donovan*, 290 Minn. 421, 188 N.W.2d 864 (1971); *State* v. *Min-*

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[2] The uniformity clause of our state constitution is no more restrictive upon the legislature's power to tax or classify than is the Equal Protection Clause of the Fourteenth Amendment. *Elwell* v. *County of Hennepin*, 301 Minn. 63, 221 N.W.2d 538 (1974). The United States Supreme Court has stated that where taxation is concerned and no specific Federal right, other than equal protection, is involved, the states have considerable discretion. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973).

nesota Farmers' Mut. Ins. Co., 145 Minn. 231, 176 N.W. 756 (1920). Every presumption being invoked in favor of the constitutionality of an act of the legislature, plaintiffs have the burden of proof to show beyond a reasonable doubt that the act conflicts with the uniformity clause of the state constitution. See *Elwell* v. *County of Hennepin*, 301 Minn. 63, 221 N.W.2d 538 (1974).

Plaintiffs contend that they have met their burden in that the record shows that there is no difference between severed and unsevered mineral interests which can constitutionally justify the tax imposed on the former[1] without similar treatment of the latter. Specifically plaintiffs argue that, to the extent severed mineral interests have gone untaxed, so too have unsevered mineral interests escaped taxation. In addition plaintiffs argue that the practical problems attending the taxation of severed mineral interests; i.e., the difficulty in valuating and assessing severed mineral interests, apply with equal force to unsevered

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[1] The pertinent provisions of Minn.St. 273.13, subd. 2a, which subjects severed mineral interests to taxation, read in part: "Class 1b. 'Mineral interest', for the purpose of this subdivision, means an interest in any minerals, including but not limited to gas, coal, oil, or other similar interest in real estate, which is owned separately and apart from the fee title to the surface of such real property. Mineral interests which are filed for record in the offices of either the county recorder or registrar of titles pursuant to sections 93.52 to 93.58, constitute class 1b, and shall be taxed as provided in this subdivision unless specifically excluded by this subdivision. A tax of $.25 per acre or portion of an acre of mineral interest is hereby imposed and is due and payable annually. If an interest filed pursuant to sections 93.52 to 93.58 is a fractional undivided interest in an area, the tax due on the interest per acre or portion of an acre is equal to the product obtained by multiplying the fractional interest times $.25, computed to the nearest cent. However, the minimum annual tax on any mineral interest is $2. No such tax on mineral interests is due and payable on the following: (a) Mineral interests valued and taxed under other laws relating to the taxation of minerals, gas, coal, oil, or other similar interests; (b) Mineral interests which are exempt from taxation pursuant to constitutional or related statutory provisions * * *."

mineral interests. We disagree with plaintiffs' view of the record.

Upon the evidence the district court entered the following finding of fact:

> "Where taxable real property includes the rights to both surface and mineral interests (estates), the assessed valuation, and hence the property tax levied, reflects the value, if any, assigned by market forces to the totality of these rights. Plaintiffs have failed to demonstrate that such 'unsevered' mineral rights have, like severed mineral interests, escaped ad valorem property taxation."

This finding is supported by the testimony of Peter N. Handberg, the St. Louis County Assesor. He testified that in determining the "market value" of a parcel of land for tax purposes he looks to "sales of comparable properties wherever they are available," and that for rural lands (which account for the bulk of severed mineral interests) "sales are the only basis" for determining market value. These comparisons are made on the assumption that the entire "bundle of rights" that comprise the fee simple interest in the parcel, including mineral rights, are merged in one owner.

[4,5] The value determined by this method might very well be affected by the value of the mineral rights. Mr. Handberg so testified in response to a question put to him by one of plaintiffs' attorneys:

> "Q. Now, as a practical matter, in St. Louis County, with the exception of the Mesabi or Biwabik Iron formation * *, would you agree that the practice is and has been as long as you have known it, not to include the value of the minerals in arriving at an assessment where there is no objective evidence or reliable data to indicate whether or not there are minerals located therein?

> THE WITNESS [Mr. Handberg]: I don't think that's a correct statement. I think that the value we put on the property based on sales of similar property to include a mineral value. For example, if the property is sold in an area where the mining companies are interested or many properties are sold, it drives up the sales prices of the property, and so we use the sale prices as a basis of our valuation."

The fact that assessors may not value mineral interests as a separate item is not significant. As Mr. Handberg's testimony clearly shows the value of a piece of property is a composite of a number of factors, one of which includes the value of the mineral interests if unsevered. Cf. *Independent School Dist No. 99* v. *Commr. of Taxation,* 297 Minn. 378, 211 N.W.2d 886 (1973). In determining market value of property for ad valorem tax purposes, assessing authorities should consider and give due weight to every element and factor affecting market value. Therefore the district court's finding that unsevered mineral interests are valued and taxed under the normal ad valorem property tax system is adequately supported by the evidence. Since none of the parties disputes the district court's findings that severed mineral interests have escaped taxation, we cannot say that the separate classification of severed mineral interests is without a reasonable basis in fact. *Johnson* v. *Donovan, supra.*

Concerning the separate taxation of severed mineral interests the district court made two critical findings. First, the district court found that most severed mineral interests cannot be assessed for ad valorem property tax purposes for two reasons:

> "(1) The value of the mineral in the ground can only be determined by prohibitively expensive exploration such as drilling and drill core analysis; and
>
> (2) Data currently available to assessors on sales and exchanges of the property rights in mineral estates (i. e.,

> severed mineral interests) is very limited. Therefore, in most cases such available data is insufficient to permit the derivation of market values for individual severed mineral interests from the sales prices or values of comparable interests."

Second, the district court found that every mineral interest in Minnesota has some value as a property interest regardless of its location, although the value of mineral interests may vary from one part of the state to another. The first finding is not contested.

Plaintiffs vigorously contest the second finding. They rely on the expert testimony of Donald Lindgren, a geologist, who testified that the value of plaintiff's mineral interests vary widely in value, some having no economic value at the present time. The record also contains, however, testimony of other expert witnesses who detailed the abundance and distribution of minerals within the state, the history of mineral development, and the potential for future development. Even Mr. Lindgren testified to the potential for future development. On this record we cannot say that the district court's finding is clearly erroneous.

In sum the evidence supports the legislature's findings that a class of valuable property interests were escaping taxation because of the practicable difficulties in identifying, valuing, and assessing those interests within more traditional tax schemes. In light of this evidence we cannot say that the practical considerations which prompted the legislature to classify separately severed mineral interests and to impose a tax of $.25 per acre per year or $2.00 per year, whichever is greater, were unreasonable.

That practical considerations can serve as the basis for the classification and taxation of proerty was established long ago in *Mutual Benefit Ins. Co.* v. *County of Martin,* 104 Minn. 179,

116 N.W. 572 (1908).[4] There this court upheld the taxation of mortgages separately from other personalty with the following language:

> "There were good and sufficient reasons why a special method should be devised for the taxation of this kind of property. It is a notorious fact that the owners of securities in the form of bonds and notes have not been in the habit of paying their proportionate share of the taxes. This has been due in a measure to the ease with which the existence of such property can be concealed from the tax officials. But when the owner of a note takes a mortgage on real estate as security and places it upon the public records, he exposes his ownership * * * and enables the assessor to reach him. * * The owner is thus tempted to seek some devious method for escaping taxation, in order that he may be on an equality with the owner of an unsecured note or bond, which rests undiscovered in a safety deposit vault. * * * *Experience has shown that it is very difficult, if not impossible, to fairly and successfully tax this kind of property under the system ordinarily applied to personal property. This practical difficulty alone furnishes a basis for a classification, and justifies the legislature in devising a special method for the taxation of the subjects of that class.* * * * By requiring a registration tax, every mortgage security pays a moderate tax, and this, in the judgment of the legislature, is preferable to the certain uncertainties of the old system." (Emphasis added.) 104 Minn. 182, 116 N.W. 574. Cf. *Johnson* v. *Donovan, supra.*

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[4] The United States Supreme Court has also recognized practical considerations as sufficient bases for state tax classifications. See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973); *Madden* v. *Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940).

We think the reasoning in the *Mutual Benefit* case applies with equal force here. Here the taxation of severed mineral interests in the same manner as other realty proved to be impracticable and also, because of this impracticability, had encouraged the separate ownership of surface and mineral estates. A class of property having some value was not paying its proportionate share of taxes. The remedy chosen by the legislature was to tax mineral interests on a uniform basis, which is but one part of the general system of mineral taxation. The tax is imposed only on those mineral interests not "valued and taxed under other laws relating to the taxation of minerals, gas, coal, oil or other similar interests." Minn.St. 273.13, subd. 2a. For example: the state tells us that where the value of the minerals themselves is determined, a tax is levied on the basis of such value. Unmined iron ore, except certain low recovery ore, is designated as Class 1a real property, presently assessed at 50 percent of its market value, and taxed at the prevailing mill rate. Minn.St. 273.13, subd. 2. Low recovery iron ores also fall within class 1a but are valued at from 30 percent to 48½ percent of market value. Minn.St. 273.15. Unmined taconites and iron sulphides are to be assessed and taxed on the basis of value with the one important difference that the tax may not exceed $10.00 per acre. Minn.St. 298.26. Finally, all other severed mineral interests, to the extent they can be valued, are susceptible to ad valorem taxation pursuant to Minn.St. 272.04 in the same manner as other interests in land. In effect the legislature has directed that severed mineral interests be taxed in relation to value or production where possible but that under no circumstances can such an interest be taxed at less than $2.00 per interest. We cannot say that the legislature has exceeded its discretion.

The cases upon which plaintiffs rely do not compel a contrary conclusion. In *State ex rel. Owen* v. *Donald,* 161 Wis. 188, 153 N.W. 238 (1915), the plurality opinion declared unconstitutional a statute which imposed a tax on severed mineral in-

terests. The concurring opinion of Justice Timlin, however, indicates that the reason the statute was invalid was because its tax forfeiture provisions treated owners of severed mineral interests differently from owners of other property interests. Likewise, in *Northwestern Improv. Co.* v. *Morton County,* 78 N.D. 29, 47 N.W.2d 543 (1951), the statute taxing severed mineral interests was unconstitutional because it imposed a tax on severed mineral interests created by reservations in deeds but did not tax severed mineral interests created by a direct conveyance of the mineral interest. The court cited an earlier decision upon which plaintiffs heavily rely, *Northwestern Improv. Co.* v. *State,* 57 N.D. 1, 220 N.W. 436 (1928), only for the proposition that a classification cannot be based solely on the manner mineral rights are severed from the surface interest. The North Dakota Supreme Court did not give the decision the broad interpretation the plaintiffs urge this court to adopt.

[6]. 2. Plaintiffs also argue that the Minnesota Constitution requires that real property taxes be related to value. Plaintiffs have cited no authority, however, and we have discovered none, that directly supports their argument. To the contrary the language of the constitution and its interpretation by this court suggest that the controlling constitutional provision was specifically amended to eliminate the absolute requirement that taxes be related to value.

The Minnesota Constitution currently provides only that "[t]axes shall be uniform upon the same class of subjects * * * ." Minn.Const. art. 10, § 1. Prior to 1906, however, the Minnesota Constitution required "taxes to be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the state." Minn.Const. art. 9, § 1 (1857), amended 1869, 1881, 1894, 1906. Interpreting the prior constitutional language, this court declared unconstitutional a probate fee arbitrarily based upon a cash valuation, *State* v. *Gorman,* 40 Minn. 232, 41 N.W. 948 (1889); and a tax of one cent per ton on

iron ore mined within the state. *State* v. *Lakeside Land Co.*, 71 Minn. 283, 73 N.W. 970 (1898). In response to a number of unfavorable tax decisions the people of the state amended the constitution in 1906 to its present broad provision. Anderson, *The Need for Constitutional Revision in Minnesota,* 11 Minn.L.Rev. 189, 204. The purpose of the 1906 amendment was to free the legislature from most of the previous constitutional restraints.

> "The fair adjustment of tax burdens * * * demanded more comprehensive powers in the legislature; and the people, relying upon the responsibility of that body to its constituents, relaxed the restraints theretofore existing." *Reed* v. *Bjornson,* 191 Minn. 254, 259, 253 N.W. 102, 104 (1934).

The "wide-open tax amendment," as it was popularly called, eliminated the "absolute requirement of taxation of all property on the basis of a cash valuation." W. Anderson, A History of the Constitution of Minnesota 190 (1921).

The cases upon which plaintiffs rely do not directly support their position. In *Independent School Dist. No. 99* v. *Commr. of Taxation,* 297 Minn. 378, 211 N.W.2d 886 (1973), this court reversed a decision of the Tax Court because the record did not indicate whether the assessing authorities considered every element affecting market value as required by the statutory scheme. The decision did not, however, contain any language indicating market value was a constitutional requirement. Similarly, plaintiffs' reference to Minn.St. 273.11 as legislative recognition that property must be taxed according to value can be equally rationalized as a legislative recognition of equality. See *In re Petition of Dulton Realty, Inc.* v. *State,* 270 Minn. 1, 15, 132 N.W.2d 394, 405 (1964).

[7,8] Nor are cases involving the validity of assessments for real estate taxes persuasive. See *In re Petition of Dulton Realty,*

Inc. v. *State, supra; In re Petition of Hamm* v. *State,* 225 Minn. 64, 95 N.W.2d 649 (1959). Both cases simply require that taxes on any one piece of property be uniform in relation to the taxes levied on other property of the same class. It is true that this court said, in reference to the uniformity clause, that it does not "permit the adoption of an arbitrary yardstick of valuation for all properties which ignores their differences in actual market value." 255 Minn. 70, 95 N.W.2d 654. Here however, none of the parties contest the fact that severed mineral interests cannot readily be valued. Taken together with the district court's finding that every mineral interest has some value as a property interest regardless of its location, the uniform tax imposed on severed mineral interests represents a reasonable exercise of the legislature's authority to tax a class of real property that has escaped taxation. The uniformity clause does not require absolute equality:

> "* * * The distribution of the tax burden in such manner as seems equitable is recognized as a proper exercise of the power of taxation. The selection of subjects of taxation * * * is inherent in that power. The process of selection involves classification with resulting diversity in the subjects selected for taxation * * * as well as in the amount of the tax." *C. Thomas Stores Sales System, Inc.* v. *Spaeth,* 209 Minn. 504, 297 N.W. 9, 16 (1941).

As noted earlier the separate classification of severed mineral interests is reasonable. Therefore the fact that the amount of tax may vary in some instances depending on the number of owners does not make the tax constitutionally infirm.[5]

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[5]Plaintiffs made a further argument that a tax which exceeds the value of the property tax is unconstitutional. The test whether a tax statute violates the due process clause of the Fourteenth Amendment is whether the tax is within the lawful power of the legislature. The due process clause is applicable only if the tax is so arbitrary as to compel

Plaintiffs also have referred to cases from other jurisdictions which support their position. See, e.g., *State of Texas* v. *Federal Land Bank of Houston,* 160 Tex. 282, 329 S.W.2d 847 (1959); *Chicago and Northwestern Transportation Co.* v. *Pederson,* Bayfield County Circuit Court, December 18, 1975, affirmed, 80 Wis.2d 566, 259 N.W.2d 316 (1977). Those decisions are not persuasive, however, since those jurisdictions contain constitutional provisions dissimilar from that in our constitution. For example, the Texas Constitution expressly requires that all property be taxed in proportion to its value. Tex.Const. art. 8, § 1. Similarly, the Wisconsin Supreme Court, interpreting that state's uniformity clause, has stated that all property taxed must bear its burden equally on an ad valorem basis. See *Gottlieb* v. *Milwaukee,* 33 Wis.2d 408, 424, 147 N.W.2d 633, 641 (1967).

3. The statutory scheme at issue requires the owners of severed mineral interest to file a verified statement containing, *inter alia,* the legal description of the property upon or beneath which the severed mineral interest exists, and information indicating where the instrument from which the severed mineral interest was created or acquired, may be found. Minn.St. 93.52, subd. 2. If the owner of a severed mineral interest fails to file the verified statement within the alloted time period, the mineral in-

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the conclusion that the statute does not involve the exercise of the taxing power but a direct exercise of a different and forbidden power. *A. Magnano Co.* v. *Hamilton,* 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109 (1934). Any attempt to determine the constitutionality of a tax by its amount furnishes "no judicial ground for striking down a taxing act." 292 U.S. 47, 54 S.Ct. 602, 78 L.Ed. 1116.

On this record we cannot say that the tax imposed on severed mineral interests is so arbitrary as to violate due process. The record clearly establishes that severed mineral interests were not paying any taxes, that some severed mineral interests were created to avoid ad valorem taxation, and that severed mineral interests have some value. The legislature's response, which assures that all severed mineral interests will pay at least some tax, is not unreasonable as an exercise of its power to tax.

terest forfeits to the state. Minn.St. 93.55. Plaintiffs argue that the registration and forfeiture provisions violate the due process clauses of the state and Federal constitutions.

[9,10] Where an economic regulation is involved, due process requires that legislative enactments not be arbitrary or capricious; or, stated differently, that they be a reasonable means to a permissive objective. *Lee* v. *Delmont,* 228 Minn. 101, 36 N.W.2d 530 (1949); *McElhone* v. *Geror,* 207 Minn. 580, 292 N.W. 414 (1940); *Nebbia* v. *New York,* 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1934). Due process demands only that (1) the act serve to promote a public purpose, (2) it not be an unreasonable, arbitrary or capricious interference, and (3) the means chosen bear a rational relation to the public purpose sought to be served. *Federal Distillers, Inc.* v. *State,* 304 Minn. 28, 229 N.W.2d 144, appeal dismissed, *sub nom., Heaven Hill Distilleries, Inc.* v. *Novak,* 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

Plaintiffs do not seriously quarrel with the purpose of the act, which is to identify and clarify the obscure and divided ownership conditions of severed mineral interests in order to facilitate their development. Minn.St. 93.52, subd. 1. Plaintiffs do argue, however, that the registration requirement is unreasonable in that the record indicates that owners of severed mineral interests are not difficult to locate. But the record also contains evidence indicating that a large number of mineral interests were severed in the late nineteenth century and early twentieth century, that a large number of the severed mineral interests are fractionalized, and that the determination of ownership of the fractionalized mineral interests is time consuming and often hinders exploration and development of minerals. On this record we cannot say that registration requirement is unreasonable.

[11] Plaintiffs also argue that the forfeiture provisions bear no reasonable or legitimate relationship to any end sought by the registration requirements. The basis for their argument is

that under the prior statutory scheme, owners of severed mineral interests were given until January 1, 1975, to file the verified statements of ownership. The penalty imposed for the failure to file was to permit the Commissioner of Natural Resources to lease the mineral interest as agent for the owner. Minn.St. 1971, § 93.52, subd. 2; § 93.55. Prior to the filing deadline, however, the legislature enacted the forfeiture provisions as the penalty for failure to comply with the registration requirement. Thus plaintiffs argue that the legislature was in no position to know whether the forfeiture provisions were necessary or not. While the record indicates that some statements were not filed before the forfeiture provisions were in effect because the deadline had not expired, the record also indicates that, for whatever reason, the filings were not being made. Therefore the legislature could conclude that the penalty of forfeiture was necessary to ensure that the necessary filings would be made. The legislature also could have concluded that the former penalty provisions, i.e., allowing the state to lease the mineral interest, were inadequate in light of the tax imposed on severed mineral interests. Owners of severed mineral interests might well be reluctant to make the necessary filings and thereby subject their interest to taxation. Given the public purpose of the act, the means chosen by the legislature do not violate due process.

[12] 4. The statutory scheme at issue required that notice of the registration requirement and the attendant forfeiture provisions be given by publication of the scheme in a legal newspaper within each county in the months of October, November and December, 1973, and in two publications related to mining activities which have a nationwide circulation. Minn.St. 93.58. The scheme also provided that if the owner of a severed mineral interest fails to make the required filings within the allotted time period, the mineral interest forfeits to the state. Minn.St. 93.55. Thereafter anyone claiming an ownership interest in a severed mineral interest before forfeiture may commence an action to determine ownership and the fair market value both at the time

of forfeiture and the time of bringing the action. The successful claimant recovers lesser of the two values. *Id.* Plaintiffs argue that the statutory scheme violates the due process clauses of the state[6] and Federal constitutions[7] because the notice provisions are inadequate and because an owner of a severed mineral interest who fails to comply with the registration requirement is denied an opportunity for a hearing before the forfeiture occurs. We agree.

[13] At a minimum the due process clause requires that deprivation of property be preceded by notice and an opportunity for a hearing appropriate to the case. *Mullane* v. *Central Hanover, etc., Tr. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The *Mullane* court discussed the sufficiency of notice as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citations omitted.) The notice must be of such nature as reasonably to convey the required information * * * But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." 339 U.S. 314, 70 S.Ct. 657, 94 L.Ed. 873.

The question is whether the state's efforts of notification can be said to be reasonably calculated to apprise the owners of severed mineral interests of the pendency of the forfeiture. Cf. *Robinson* v. *Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972).

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[6]Minn.Const. art. 1, § 7.

[7]U.S.Const. Amend. XIV.

The state argues that notice by publication is constitutionally adequate here because of the practicalities and peculiarities associated with identifying and locating owners of severed mineral interests. See Minn.St. 93.52, subd. 1. It is true that the St. Louis County Assessor testified that information concerning the identification and ownership of severed mineral interests is not contained in public records and, where contained in private abstract records, is prohibitively expensive to obtain. But the record also contains testimony indicating that owners of severed mineral interests could be identified and located. The statute as written, however, does not distinguish between those owners who could be identified with little or no diligence and those whose identity, even with due diligence, could not be ascertained. Under these circumstances, we think notice by publication of the statutes alone is inadequate.

[14] The United States Supreme Court has recognized that publication alone is not a reliable means of acquainting interested parties of the fact that their interests are subject to forfeiture:

> "* * * Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper * * *" *Mullane,* 339 U.S. 315, 70 S.Ct. 658, 94 L.Ed. 874.

We likewise have recognized the unreliability of notice by publication. *Meadowbrook Manor, Inc.* v. *City of St. Louis Park,* 258 Minn. 266, 104 N.W.2d 540 (1960). In the instant case the chance of notice is further reduced in that the notice required to be published does not name those whose attention it is supposed to attract. Furthermore the state is not required to do anything, e.g., attachment, entry upon real estate, which might reasonably be expected to call to the owner's attention that his mineral interest is subject to forfeiture. Under these circumstances, notice by publication is inadequate where forfeiture is the penalty imposed for mere failure to act. Cf.

Lambert v. *California,* 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957).

[15] We are also in agreement with plaintiffs' argument that the statutory scheme attending the forfeiture provisions violates due process because it contains no provision for a hearing to determine the validity of the forfeiture. Due process requires, except in emergency situations, a hearing that is meaningful and appropriate to the nature of the case before a party can be deprived of a property interest. *Mullane, supra.* The statute in question contains, in part, the following language:

> "If the owner of a mineral interest fails to file the verified statement * * the mineral interest shall forfeit to the state. * * * After the mineral interest has forfeited to the state pursuant to this section, a person claiming an ownership interest before the forfeiture may recover the fair market value of the interest, only in the following manner. An action must be commenced within six years after the forfeiture under this section to determine the ownership. * *." Minn.St. 93.55.

The language of the statute clearly provides that, upon the failure to file the verified statement, the mineral interest forfeits to the state; the only judicial determination to be made is whether the party thereafter claiming an ownership interest was the owner at the time of forfeiture. The only remedy available to an owner whose interest has forfeited is the following:

> "* * * Persons determined by the court to be owners of the interests at the time of forfeiture to the state under this section may present to the commissioner of finance a verified claim for refund of the fair market value of the interest. * * Thereupon the commissioner of finance shall refund to the claimant the fair market value at the time of forfeiture or at the time of bringing the action, whichever is lesser, less any taxes, penalties, costs, and interest which

> could have been collected during the period following the forfeiture under this section, had the interest in minerals been valued and assessed for tax purposes at the time of forfeiture under this section * * * Minn.St. 93.55.

We cannot imagine a more clear violation of due process than the failure to provide a hearing before forfeiture. *Mullane, supra.*

[16] Defendants argue that the constitutionally-required hearing is merely postponed and that the remedy provided is adequate under the circumstances. Defendants rely on *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), wherein the court stated that, in limited circumstances, immediate seizure of a property interest, without an opportunity for a prior hearing, is constitutionally permissible. In determing whether an immediate seizure of a property interest may be constitutionally permissible, the court looks at the following: (1) whether the seizure is necessary to secure an important governmental or general public interest, (2) whether there exists a special need for very prompt action, and (3) whether the state has kept strict control over its monopoly of force.

We do not think the *Fuentes* exception is applicable. First, in those cases cited by the Supreme Court as employing the exception, a party whose property interest was subjected to immediate seizure had an opportunity to contest the seizure itself. See, *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974); *Robinson* v. *Hanrahan,* 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972); *Phillips* v. *Commissioner of Internal Revenue,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931). No such opportunity is available here.

Second, assuming arguendo that the *Fuentes* exception is applicable, defendants have not indicated why the prompt forfeiture provisions are necessary. See, e. g., *North American, etc., Storage* v. *Chicago,* 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed.

195 (1908) (postponement of notice and hearing constitutionally permissible to protect public from contaminated food). While forfeiture may be a necessary incentive to ensure filing, there does not appear to be any special need to dispense with the constitutionally required hearing before the forfeiture. Defendant's argument based on *Fuentes* is not persuasive.

Defendants also argue that the registration and forfeiture provisions contained in the mineral registration are sufficiently analogous in effect to the marketable title act, Minn.St. 541.023, which was upheld in *Wichelman* v. *Messner,* 250 Minn. 88, 83 N.W.2d 800 (1957), as to allow the constitutionality of the former to be sustained on the strength of the latter. Briefly stated, the court's holding in *Wichelman* sustained the constitutionality of the marketable title act, which required those owning interests in "old conditions and restrictions," e. g., right of re-entry, possibility of reverter, to record notice of the continued existence of such rights or permit their extinguishment by the barring of future actions affecting possession based on any such conditions or restrictions.

Specifically defendants argue that the enactment of the legislation, the publication of the act's provisions in a legal newspaper in each county throughout the state, and the time period allowed within which to make the required filing, are sufficient to comport with due process. Defendants point out that a period of 9 months within which to file the required notice was approved vis-a-vis the marketable title act; the mineral registration act allowed at least 19 months. In *Wichelman,* however, the court discussed the amount of time given to make the required filings, not with respect to the sufficiency of notice, but with respect to the constitutional prohibition against retrospective legislation. The court specifically stated that lack of notice was not a valid consideration. 250 Minn. 110, 83 N.W.2d 818. In any event we do not find defendants' analogy between the mineral registration act and the marketable title act to be persuasive.

The marketable title act was intended, as its name indicates, to "relieve a title from the servitude of provisions contained in ancient records which 'fetter the marketability of real estate.'" *Wichelman, supra,* 250 Minn. 100, 83 N.W.2d 812. The legislature may have concluded that the servitudes arising from ancient records had outlived the reasons for their creation, that they may have been created for the benefit of persons who are disinterested in the observance of the conditions and restrictions, and that the interest impede the full economic use of property. Further, the marketable title act provided that the person against whom the act is invoked is conclusively presumed to have abandoned his interest in the property. Minn.St. 541.023, subd. 5. Thus the marketable title act was not intended to extinguish valid but inconvenient claims. The mineral registration act, on the other hand, extinguishes valid as well as invalid claims upon the mere failure to file. It is unlikely that the holders of mineral rights have any intention of abandoning their rights; thus, any conclusive presumption of abandonment would be devious and would amount to intellectual dishonesty. Under these circumstances publication is not adequate.

Again analogizing to the marketable title act and its interpretation in *Wichelman, supra,* defendants argue that the mineral registration act can be sustained as a statute of limitations in that the failure to file under either scheme divests an owner of a property interest. We disagree.

The purpose of a statute of limitations is to "prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy." *Bacherta* v. *Hayes-Lucas Lumber Co.,* 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). Statutes of limitations generally affect the remedy and not the right. *Baker* v. *Kelley,* 11 Minn. 480 (1866). The United States Supreme Court has recognized that the distinction between substantive rights and remedial or procedural rights vis-a-vis statutes of limitation may not be clear cut. Nevertheless the court has adopted as a matter of constitu-

tional law the hypothesis that statutes of limitation go to matters of remedy, not to destruction of rights. *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 65 S.Ct. 1137, 89 L.Ed. 1628 (1945). The mineral registration act, however, directly affects a property interest without any pretense of affecting a remedy only. The effect of defendants' argument is to destroy the distinction between substantive rights and procedural rights. While we recognize that the distinction may in some cases be difficult to discern, this case is not one of them.

Finally, defendants argue that the constitutionality of the mineral registration act can be sustained on the authority of the marketable title act in that both have the sanctions of a recording act.[8] In support of their position defendants make the following points. First, the penalty for failure to comply with the marketable title act, as with the mineral registration act, is the possibility of complete divestiture of ownership of a property interest. Second, under both the marketable title act and the mineral registration act, forfeiture may be prevented by filing the required information. Finally, as noted in *Wichelman, supra,* the marketable title act and the mineral registration act both have as their justification improving the marketability of real estate. Therefore defendants conclude the mineral registration act is a valid exercise of the police power.

While the analogy to the sanctions of a recording act may have been proper in the context of the marketable title act which was directed principally at interests in property which have outlived the reasons for their creation, that analogy is not proper here. It is true that both the marketable title act and the mineral registration act attempt to remedy defects in the recording system through the imposition of similar penalty provisions. To

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[8] There is no question that recording acts are constitutional as a valid exercise of the police power. *Jackson* v. *Lamphire,* 28 U.S. (3 Pet.) 280, 7 L.Ed. 679 (1830). See *American Land Co.* v. *Zeiss,* 219 U.S. 47, 31 S.Ct. 200, 55 L.Ed. 82 (1911).

that extent defendant's analogy is appropriate but only to that extent. As noted previously, the mineral registration act is not directed at interests created in ancient records which have outlived their usefulness but at all severed mineral interests whenever created. Further the marketable title act was limited to stale claims which could be presumed to be abandoned and of no value. The mineral registration act however, is not so limited. As the district court found, every mineral interest has some value as a property interest; some of plaintiffs' interest has some value as a property interest; some of plaintiffs' interests appear to be enormously valuable. Finally, the mineral registration act and traditional recording acts are easily distinguished by their operation and effect. The failure to file under a recording act does not automatically result in divestiture. Recording acts typically divest the rights of a grantee in an unrecorded conveyance only if his grantor conveys the same interest to a subsequent purchaser who purchases in good faith and for value. See Minn.St. 507.34. Since the consequences of failing to file are so different, what satisfies due process in terms of a recording act is not sufficient for the mineral registration act.

5. Plaintiffs argue that certain language used in Minn.St. 93.52, subd. 2, is so vague and ambiguous as to violate due process. The statute, with emphasis on the challenged language, reads in part as follows:

> "* * * [E]very owner of a fee simple interest in *minerals*, hereafter referred to as a mineral interest, in lands in this state, which interest is owned separately from the fee title to the surface of the property upon or beneath which the mineral interest exists, shall file for record * * * in the county where the mineral interest is located a verified statement citing section 93.52 to 93.58 and setting forth his address, his *interest in the minerals* and both (1) the legal description of the property upon or beneath which the interest exists, and (2) the book and page number or the document number * * *." (Emphasis added.) Minn.St. 93.52, subd. 2.

[17] In considering plaintiffs' claim we begin with the presumption of constitutionality. A statute will not be declared void for vagueness unless it is so uncertain and indefinite that after exhausting all rules of construction it is impossible to ascertain legislative intent. *Wichelman, supra.* We further explicated the general rule in *Wichelman* with the following:

> "* * * A statute will not be declared void for vagueness and uncertainty where the meaning thereof may be implied, or where it employs words in common use, or words commonly understood, or words previously judicially defined, or having a settled meaning in law, or a technical or other special meaning well enough known * * *, or an unmistakable significance in the connection in which they are employed. In short, legislation otherwise valid will not be judicially declared null and void on the ground that the same is unintelligible and meaningless unless it is so imperfect and so deficient in its details as to render it impossible of execution and enforcement, and is susceptible of no reasonable construction that will support and give it effect, and the court finds itself unable to define the purpose and intent of the legislature." 250 Minn. 111, 83 N.W.2d 819.

[18] Applying the legislative policy expressly stated in the mineral registration act, which is to identify and clarify the obscure ownership conditions of severed mineral interests in this state, we conclude that the alleged ambiguities raised by plaintiffs, being subject to reasonable constructions consistent with the legislature's intent, are not unconstitutionally vague. A short discussion of certain ambiguities raised by plaintiffs illustrates our conclusion.

[19] For example, plaintiffs, relying on *Vang* v. *Mount,* 300 Minn. 393, 220 N.W.2d 498 (1974), argue that the word "mineral" is ambiguous because what is included in a general mineral reservation depends on the intent of the parties and the circumstances surrounding the reservation. It is clear from the

language of the statute and from the express legislative intent that the legislature intended owners of all severed mineral interests to register, regardless of what the parties intended to convey. For that reason plaintiffs' reliance on *Vang* v. *Mount* is misplaced.

[20] Plaintiffs also contend that the phrase "owned separately from the surface" is ambiguous in that a mineral interest once severed but now owned by the same person who owns the surface might be considered still severed for purposes of Minn.St. 93.52, subd. 2. We do not agree. The plain purpose of the mineral registration act is to locate, identify, and tax mineral interests owned by someone other than the owner of the surface interest. Minn.St. 93.52, subd. 1; 272.039. Where the surface and mineral interest are jointly owned, it is obvious that the mineral registration requirements do not apply.

[21] A final example is plaintiffs' argument that the meaning of the requirement that the owner must refer to the "instrument by which the mineral interest is *created or acquired*" is ambiguous, one interpretation being that two such instruments might exist—one which created the instrument and one by which the present owner acquired the interest. The purpose of the statute being to identify current owners, the statute requires the statement in such a case to refer to the instrument by which the mineral interest was acquired. The legislature obviously included the disjunctive "or" in recognition of the fact that there may be cases where no deed or other instrument named the current claimant as owner. In those cases reference to the instrument creating the mineral interest is appropriate. We need not burden this opinion with examples of other ambiguities raised by plaintiffs. It is sufficient to say that the mineral registration act is not unconstitutionally vague.

Affirmed.

SHERAN, C. J., and OTIS and ROGOSHESKE, JJ., took no part in the consideration or decision of this case.

APPENDIX I

THE SUPREME COURT OF ILLINOIS

Docket No. 52136

ROBERT JOE WILSON, Appellant, v. MARCEIL GREENHALGH BISHOP *et al.*, Appellees.

(Decided October 17, 1980)

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

This litigation arose in 1976 when it was discovered that commercial quantities of oil underlay a portion of a 72-acre tract of land in White County in which the surface area is owned by plaintiff, Robert Joe Wilson. The dispute concerns ownership of an undivided one-third interest in the oil and gas, which plaintiff claims pursuant to the operation of the dormant mineral interests act (the Act) (Ill. Rev. Stat. 1975, ch. 30, pars. 197, 198). The circuit court of White County, however, held that those sections "violate the due process and contract clauses of the Constitutions of the State of Illinois and the United States." The appeal comes directly to us pursuant to our Rule 302(a). 73 Ill. 2d R. 302(a).

Plaintiff alleged that defendant Marceil Greenhalgh Bishop, and defendants Donald B. Driscoll and Ann Driscoll, individually and as trustees under the will of Beatrice M. Driscoll, abandoned their ownership of the disputed interest by failing to file written notices in the recorder's office of White County or by otherwise preserving their ownership as provided in the following sections of the Act:

> "Sec. 1. Any interst in oil, gas, or associated hydrocarbons, liquid or gaseous, in any land owned by anyone

other than the owner of the surface, which has not been devised, sold, leased, mortgaged or transferred by instrument recorded in the office of the recorder of deeds in the county where such interest is located for a period of 25 years shall, in the absence of the actual production of oil, gas or associated hydrocarbons, liquid or gaseous, from such land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, during such period of 25 years, be deemed abandoned, unless the owner thereof, within 3 years after the effective date of this Act or within 25 years after the last devise, sale, lease, mortgage or transfer of record of such interest or actual production of oil, gas or associated hydrocarbons, liquid or gaseous, from such land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, whichever is later, records a claim of interest as provided in this Act. Any interest in oil, gas or associated hydrocarbons, liquid or gaseous, deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner of the surface."

"Sec. 2. Any interest in oil, gas or associated hydrocarbons, liquid or gaseous, referred to in this Act may be preserved by the recording within the period specified in this Act a written notice in the recorder's office for the county where such interest is located, which notice shall be verified by oath, describe the land and the nature of the interst claimed, give the name and address of the person or persons claiming the interest, and state that such person or persons desire to preserve the interest and do not intend to abandon same. This recording of notice preserves such interest from abandonment for a period of 25 years thereafter when, if the nondormant character of the interest has not been evidenced by sale, lease, mortgage or transfer by instrument recorded in the recorder's office for

> the county where such interest is located, oil, gas or associated hydrocarbons, liquid or gaseous, actually produced from those land, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or a like notice filed, such interest shall be deemed abandoned. In the absence of prior abandonment, such interest may be preserved indefinitely by the filing of notices or by other actions evidencing nondormancy of the interest in accord with this Act at intervals of not more than 25 years." (Ill. Rev. Stat. 1975, ch. 30, pars. 197, 198.)

Plaintiff maintains that the statute automatically vested the disputed interest in him upon failure of defendants to comply with the statutory requirements, and that the oil and gas leases entered into between defendants and J. D. Turner in 1975 are null and void. Following a bench trial the court entered a decree which included findings that the interests of defendants Bishop and Driscoll constituted a severed freehold estate entitled to the usual rights and incidents of vested ownership, and that the quoted sections of the Act deprive defendants of their property without due process of law and impair the obligations of contract. The court accordingly declared that the oil and gas leases between defendants and Turner are valid, and ordered the impounded oil proceeds paid to defendants in proportion to their ownership interests.

In this appeal, plaintiff argues that the trial court erred in treating the rights of a severed mineral interest owner as vested property rights, in refusing to consider the Act's effect as a statute of limitations, and in finding that plaintiff did not acquire the mineral interests of defendants. It is well established "that the constitutional guarantees of procedural due process only become operative where there is an actual or threatened impairment or deprivation of 'life, liberty or property.' (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, sec. 2.) Therefore, the starting point in any procedural due process analysis is a

determination of whether one of those protectable intersts is present, for if there is not, no process is due." (*Polyvend, Inc.* v. *Puckorius* (1979), 77 Ill. 2d 287, 293-94, *appeal dismissed* (1980), ____ U.S. ____, 62 L. Ed. 2d 744, 100 S. Ct. 1001; see *Memphis Light, Gas & Water Division* v. *Craft* (1978), 436 U.S. 1, 9-10, 56 L. Ed. 2d, 30, 39, 98 S. Ct. 1554, 1560-61; *Board of Regents* v. *Roth* (1972), 408 U.S. 564, 569, 33 L. Ed. 2d 548, 556, 92 S. Ct. 2701, 2705; *Perry* v. *Sindermann* (1972), 408 U.S. 593, 599, 33 L. Ed. 2d 570, 578, 92 S. Ct. 2694, 2698.) Recognition of protected property interests requires an extraconstitutional inquiry into existing rules or provisions in State law. As the United States Supreme Court concluded in *Roth:*

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (408 U.S. 564, 577, 33 L. Ed. 2d 548, 561, 92 S. Ct. 2701, 2709.)

See *Memphis Light, Gas & Water Division* v. *Craft* (1978), 436 U.S. 1, 9, 56 L. Ed. 2d 30, 39, 98 S. Ct. 1554, 1560; *Goss* v. *Lopez* (1975), 419 U.S. 565, 572-73, 42 L. Ed. 2d 725, 733-34, 95 S. Ct. 729, 735; *Polyvend, Inc.* v. *Puckorius* (1979), 77 Ill. 2d 287, 294-95.

It has long been recognized in this State that a severed mineral interest is a freehold estate entitled to the customary incidents of ownership. (*Pickens* v. *Adams* (1955), 7 Ill. 2d 283; *Miller* v. *Ridgley* (1954), 2 Ill. 2d 223; *Jilek* v. *Chicago, Wilmington & Franklin Coal Co.* (1943), 382 Ill. 241.) This recognition, moreover, represents the position overwhelmingly embraced by other States. (*Wheelock* v. *Heath* (1978), 201 Neb. 835, 272 N.W.2d 768; *Chicago & North Western Transportation Co.* v. *Pedersen* (1977), 80 Wis. 2d 566, 259 N.W.2d 316; *Trustees of Tufts College* v. *Triple R. Ranch, Inc.* (Fla. 1973), 275 So. 2d

521; 1A W. Summers, Oil and Gas sec. 139 (1954); 54 Am. Jur. 2d *Mines and Minerals* sec. 116 (1971).) It is accordingly clear that the severed mineral interests here under consideration constitute protected property interests entitled to the procedural safeguards which due process requires.

The United States Supreme Court has emphasized that due process of law, at a minimum, prohibits the deprivation of property without providing notice and an opportunity for a hearing appropriate to the nature of the case. (*Memphis Light, Gas & Water Division* v. *Craft* (1978), 436 U.S. 1, 13-16, 56 L. Ed. 2d 30, 41-43, 98 S. Ct. 1554, 1562-63; *Mullane* v. *Central Hanover Trust Co.* (1950), 339 U.S. 306, 313, 94 L.Ed. 865, 872-73, 70 S. Ct. 652, 657.) While "the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved" (*Goss* v. *Lopez* (1975), 419 U.S. 565, 579, 42 L. Ed. 2d 725, 737, 95 S. Ct. 729, 738-39, citing *Cafeteria Workers* v. *McElroy* (1961), 367 U.S. 866, 895, 6 L. Ed. 2d 1230, 1236, 81 S. CT. 1743, 1748; *Morrissey* v. *Brewer* (1972), 408 U.S. 471, 481, 33 L. Ed. 2d 484, 494, 92 S. Ct. 2593, 2600; see *Powell* v. *Jones* (1973), 56 Ill. 2d 70, 78), something more is necessary than is here provided.

The Act declares that any severed interest in oil and gas shall be deemed abandoned unless the record owner, within a period of 25 years, engages in the actual production of oil or gas, publicly exercises specified acts of ownership by means of instruments recorded in the office of the recorder of deeds for the county wherein the interest is located, or files with the county recorder a written claim of interest within 3 years after the effective date of the Act or within 25 years from the last public act of ownership, whichever is later. If a written claim of interest is recorded, ownership of the interest is preserved only for the next 25 years. In the absence of one of the required acts, a statutory abandonment occurs and the severed interests automatically vest in the surface owners.

The statute provides no notice of any kind to record owners of oil and gas interests that they must record a statement of their interest in order to prevent the forfeiture of their property interests. While we recognize the beneficial purpose of the statute to facilitate the production of existing oil, gas and other mineral resources, particularly where ownership of the interests has become increasingly fractionalized and scattered, the record owners are vested with property interests entitled to the procedural safeguards of due process. Failure to provide those owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional.

When faced with similar statutes, the courts in other States have reached like conclusions. In *Wheelock* v. *Heath* (1978), 201 Neb. 835, 272 N.W.2d 768, the statute declared that severed mineral interests would be deemed abandoned unless the record owner publicly exercised defined ownership rights within a period of 23 years or asserted his interest in an action filed within 2 years after the effective date of the statute. In *Chicago & North Western Transportation Co.* v. *Pedersen* (1977), 80 Wis. 2d 566, 259 N.W.2d 316, the statute provided for the reversion of severed mineral interests to the surface fee owner unless the owner of the mineral interests registered his ownership and paid an annual registration fee. In *Contos* v. *Herbst* (Minn. 1979), 278 N.W.2d 732, the statute provided for the forfeiture of severed mineral interests to the State unless the record owner filed a registration statement. In both *Wheelock* and *Pedersen*, the forfeiture occurred without any notice, hearing or compensation to the record owner. The statute in *Contos* provided for notice by publication in a legal newspaper within each county, apparently in three issues, and in two mining publications with a nationwide circulation, and it provided for compensation following forfeiture. The court, however, found that notice by publication of the statutes alone was inadequate and concluded: "We cannot imagine a more clear violation of due process than the failure to provide a hearing before forfeiture." 278 N.W.2d

732, 743, citing *Mullane* v. *Central Hanover Bank & Trust Co.* (1949), 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652.

In *Short* v. *Texaco, Inc.* (1980),—Ind.—, 406 N.E.2d 625, however, the Indiana Supreme Court upheld a statute that provided for the reversion of severed mineral interests to surface owners if, after 20 years, no specified acts of ownership had occurred or no claim of interest had been filed within two years after the effective date of the act. The court concluded that the statute comported with procedural due process upon finding that its enactment, along with the opportunity to prevent reversion of the mineral interest by filing a claim of interest, provided sufficient notice to affected owners. That court also appears to have found support for its conclusion in the fact that such owners would receive notice and an opportunity to be heard if a court should be called upon at some future time to determine whether the statutory conditions of mandatory reversion had occurred. We are unpersuaded by these reasons and others which analogized the statute to ordinary statutes of limitation. We, moreover, regard that court's reliance on *Anderson National Bank* v. *Luckett* (1944), 321 U.S. 233, 88 L. Ed. 692, 64 S. Ct. 599, as misplaced inasmuch as the aspect of the statutes there in question did not transfer or significantly affect an owner's rights to his property. The issue there before the court was the validity of a statutory provision requiring banks to file annually with the State a report of deposits dormant for specified numbers of years, a copy of which went to the local sheriff for posting on the courthouse door. The statute required the banks to then transfer custody of those funds to the State, from which the owner could thereafter reclaim them. The issue before the Supreme Court was "whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard." (321 U.S. 233, 243, 88 L. Ed. 692, 703, 64 S. Ct. 599, 604.) The court held due process requirements satisfied, emphasizing that the owners of

the transferred funds—the depositors—were not deprived of their property since they could reclaim it from the State at any time prior to, and for five years following, a judicial decree of abandonment the validity of which was neither questioned nor passed upon. Upholding a statutory provision for the transfer to the State, after posting notice, of the *custody* of dormant bank funds cannot, in our judgment, be viewed as authority for upholding the validity of a statute which transfers, with no notice, *ownership* of vested real property interests from one private party to another.

Plaintiff would have us validate the statute in question by construing it as a statute of limitations. A similar argument was rejected by the Minnesota Supreme Court in *Contos* v. *Herbst* (Minn. 1979), 278 N.W. 2d 732, 745, with respect to the statute there under consideration. It is fundamental that statutes of limitations are procedural in nature (see *Orlicki* v. *McCarthy* (1954), 4 Ill. 2d 342; *Hilberg* v. *Industrial Com.* (1942), 380 Ill. 102; see also *Kalmich* v. *Bruno* (7th Cir. 1977), 553 F.2d 549, *cert. denied* (1977), 434 U.S. 940, 54 L. Ed. 2d 300, 98 S. Ct. 432) and are not designed to alter substantive rights or convey property interests. The time limitations of the statute in question here, however, operate to transfer vested, freehold interests. Whether denominated a statute of limitations or otherwise, its operation is simply incompatible with the due process requirements earlier expressed.

The judgment of the circuit court of White County holding the Act unconstitutional is accordingly affirmed.

Judgment affirmed.

APPENDIX J

201 Neb. 835

James R. WHEELOCK, Appellee,

v.

Opal HEATH *et al.*, Appellants.

MANNING OO RANCHES,
INC., Appellee,

v.

Opal HEATH *et al.*, Appellants.

Nos. 42118, 42119.

Supreme Court of Nebraska.

Dec. 13, 1978.

SPENCER, Chief Justice, Pro Tem.

These actions are brought under sections 57-228 through 57-231, R.R.S.1943, to extinguish the severed mineral interests owned of record by the defendants, and to vest the title to them in the plaintiffs. The trial court canceled the interests and vested title in plaintiffs. The question presented is the constitutionality of the act as retroactively applied against these defendants. We reverse.

The statutory provisions pertinent herein, all of which became effective in 1967, are as follows:

Section 57-228, R.R.S.1943: "Any owner or owners of the surface of real estate from which a mineral interest has been severed, on behalf of himself and any other owners of such interest in the surface, may sue in equity in the county where such real estate, or some part thereof, is located, praying for the termination and extinguishment of such severed mineral interest and cancellation of the same of record, naming as parties defen-

dants therein all persons having or appearing to have any interest in such severed mineral interest, and if such parties defendant are not known and cannot be ascertained, they may be proceeded against as unknown defendants under the provisions of Chapter 25, article 3."

Section 57-229, R.R.S.1943: "A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three acres immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by (1) acquiring, selling, leasing, pooling, utilizing, mortgaging, encumbering, or transferring such interest or any part thereof by an instrument which is properly recorded in the county where the land from which such interest was severed is located; or (2) drilling or mining for, removing, producing, or withdrawing minerals from under the lands or using the geological formations, or spaces or cavities below the surface of the lands for any purpose consistent with the rights conveyed or reserved in the deed or other instrument which creates the severed mineral interest; or (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same. The interest of any such owner shall be extended for a period of twenty-three years from the date of any such acts; *Provided,* that the provisions of this section shall not apply to mineral interests of which the State of Nebraska or any of its political subdivisions is the record owner."

Section 57-230, R.R.S.1943: "If the court shall find that the severed mineral interest has been abandoned, it shall enter judgment terminating and extinguishing it, canceling it of record, and vesting the title thereto in the owner or owners of the in-

terest in the surface from which it was originally severed in the proportions in which they own such interest in the surface."

Section 57-231, R.R.S.1943: "In any action filed within two years after October 23, 1967, the owner of a severed mineral interest may enter his appearance and assert his interest therein, and he shall be deemed thereby to have timely and publicly exercised his right of ownership."

The parties stipulated that case No. 42118 and case No. 42119 should be consolidated for the purpose of submitting briefs and for oral argument. The only basic difference between the two cases is the real estate involved.

On May 29, 1950, George S. Manning, for valuable consideration, executed and delivered a mineral deed to R. W. Slemaker, conveying an undivided one-half interest in and to all oil, gas, and minerals that may be produced from over 3,000 acres of land in Grant County, Nebraska. Said mineral deed warranted the title of said mineral estate forever to the grantee, his heirs, successors, executors, personal representatives, and assigns.

R. W. Slemaker and wife for valuable consideration executed and delivered mineral deeds for fractional interests to the respective defendants herein, conveying undivided interests in and to all oil, gas, and minerals that may be produced from said land. Said mineral deed warranted the title to said mineral estates.

The plaintiffs, appellees herein, James R. Wheelock and Manning 00 Ranches, Inc., subsequently acquired title to the surface and one-half of the oil, gas, and minerals in different tracts of real estate through mesne conveyances of record from the original grantor, George S. Manning. The appellees, successors in interest to the original grantor, have now brought these actions to terminate and extinguish the mineral interests owned by the defendants-appellants.

There is no factual dispute in the cases. Plaintiffs are the surface owners of the real estate involved and they also own an undivided one-half interest in all the oil, gas, and other minerals underlying their respective tracts of land. Defendants acquired their mineral interests more than 23 years prior to the filing of the actions and had not taken any of the steps required by section 57-229, R.R.S.1943, to preserve their interests.

[1] We first meet the question as to whether the act was intended to apply retrospectively. A legislative act will operate only prospectively and not retrospectively, unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Retired City Civ. Emp. Club of Omaha* v. *City of Omaha Emp. Sys.*, 199 Neb. 507, 260 N.W.2d 472 (1977). It is obvious the Nebraska act was clearly intended to apply retrospectively, because it allows actions to be filed immediately after its effective date. Section 57-231, R.R.S.1943, provides: "In any action filed within two years after October 23, 1967 * * *." The act became effective October 23, 1967.

In considering the constitutionality of the retrospective application of the act, it is necessary to define the nature of the title to a severed mineral interest. As stated by E. Kuntz in Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest, 22 Oil & Gas Inst. 81, 97 (1971): "The concept (of abandonment in the statutes of Illinois, Michigan, and Nebraska) is necessarily predicated upon an assumption by the legislature that the nature of the title is such that it is capable of being abandoned. Whether or not this assumption is a valid one must be determined by the judicial process. Such determination, in turn, will require an appraisal or reappraisal of the basic theory of ownership adopted in the state and an appraisal or reappraisal of the basic legal principles regarding abandonment of title to real property."

[2] In *Farmers Canal Co.* v. *Frank*, 72 Neb. 136, 100 N.W. 286 (1904), the rule is stated that for abandonment to occur

there must be both a relinquishment of possession or nonuser of the right granted together with the intention to abandon. It is further stated in that opinion that mere absence from and nonuser of the property do not provide an intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis. The statute, in effect, provides that failure to publicly exercise the right of ownership to a severed mineral interest for a period of 23 years conclusively establishes the intention to abandon. At common law, legal title to land could not be lost by abandonment. See *Tate* v. *Biggs,* 89 Neb. 195, 130 N.W. 1053 (1911).

[3] The general rule is stated in 54 Am. Jur.2d, Mines and Minerals, s. 116, p. 298, as follows: "When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate of inheritance subject to the laws of descent, devise, and conveyance. The owners of the two estates do not become tenants in common, although, of course, the conveyance may be so worded as to constitute the purchasers of either estate such tenants.

"A grantee of the minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. The minerals thus severed become a separate corporeal hereditament. Their ownership is attended with all the attributes and incidents peculiar to ownership of land, and they may be embraced in the terms 'land' or 'real property' in a subsequent conveyance."

[4,5] There are numerous indications under Nebraska law that mineral interests are vested property rights. In *Pfeifer* v. *Ableidinger,* 166 Neb. 464, 89 N.W.2d 568 (1958), and in *Stoller* v. *State,* 171 Neb. 93, 105 N.W.2d 852 (1960), this court held that mineral interests in land are subject to the protection of the

due process clause. Section 77-103, R.R.S.1943, provides, so far as material herein: "The terms real property, real estate and lands shall include * * * minerals * * * mineral springs and wells, oil and gas wells, * * *." In *Fawn Lake Ranch Co.* v. *Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918), this court said: "The removal of minerals, whether held in solution upon the land or resting in the soil and subsurface, is the removal of a component part of the real estate itself. The severance changes the character of the property but it remains real estate until detached." See, also, *Conway* v. *County of Adams*, 172 Neb. 94, 108 N.W.2d 637 (1961). Under section 25-2170, R.R.S.1943, mineral interests are subject to partition.

[6] In *Elrod* v. *Heirs, Devisees, Etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952), Hattie Gifford conveyed a section of land "subject to and reserving to the grantor herein personally an undivided one-half (½) interest in and to all gas, oil or other minerals in, on or under said land herein conveyed." The appellants claimed that the reservation of the mineral estate was personal to the grantor and created only a life estate which terminated at grantor's death. This court in that case held "the conclusion is inescapable that Hattie Gifford by the terms of her deed to appellants retained a fee simple estate in one-half of the gas, oil, and other minerals in the land conveyed." It may be argued, however, that this case is not dispositive since the term "fee simple" merely indicated that the grantor retained an estate of inheritance rather than indicating the possessory or corporeal nature of the interest. We incline to the view, however, that when a mineral interest is conveyed, unless the instrument provides otherwise, an estate in fee simple in land or a corporeal hereditament is created.

[7] In Comment, Abandonment of Mineral Rights, 21 Stanford L.Rev. 1227 (1969), it is stated: "Interests in land, or hereditaments, have long been categorized by the common law

for certain purposes as either 'corporeal' or 'incorporeal.' For example, fee-simple ownership of a plot of land is considered ownership of a corporeal hereditament; the owner is deemed to 'own' a corporeal substance—the land. On the other hand, an easement is an example of an incorporeal hereditament. The holder of an easement does not 'own' any tangible substance; rather, he 'owns' the right to use portions of another's land for passage. * *

"While incorporeal hereditaments, such as easements, licenses, mining claims, and franchises, have uniformly been held subject to abandonment, a firmly established common law rule provides that a corporeal interest in land cannot be abandoned. Underlying this rule is the seldom-articulated but ancient policy disfavoring voids or gaps in the chain of title to land."

In *Fawn Lake Ranch Co.* v. *Cumbow, supra,* this court said: "In *Williamson* v. *Jones,* 39 W.Va. 231, 257, 19 S.E. 436, 441 (25 L.R.A. 222), upon the question whether mineral oil in place is part of the realty it was held that it was, and that its removal constituted waste, the court saying:

"'The courts of the state of Pennsylvania have had many cases, some involving property rights of great value, in which the point arose, and have examined the question thoroughly, considered it with great care with reference to its being property where it is found, and its character and nature as property in general. "Oil is a mineral, and, being a mineral, is part of the realty. *Frank* v. *Haldeman,* 53 Pa. 229. In that it is like coal or any other natural product which *in situ* forms part of the land, It may become, by severance, personalty, or there may be a right to use or take it, originating in custom or prescription, as the right of a life tenant to work open mines, or to use timber for repairing buildings or fences on a farm, or for fire-bote. Nevertheless, whenever conveyance is made of its, whether that conveyance be called a lease or deed, it is, in effect, the grant of

a part of the corpus of the estate, and not of a mere incorporeal right. Not infrequently the oil forms by far the most valuable part of the estate." ' "

Appellees direct our attention to *Hiddleston* v. *Nebraska Jewish Education Soc.*, 186 Neb. 786, 186 N.W.2d 904 (1971), in which we held: "Constitutionality of a retroactive statute under the contract and due process clauses [of the United States and the Nebraska Constitutions] generally depends upon reasonableness. Relevant factors are the nature and strength of the public interest, the extent of modification of the asserted preenactment right, and the nature of the right altered by the statute." In that case the extinguishment of possibilities of reverter after 30 years was held to be constitutional even though the statute operated retrospectively. The court there stated: "The value of possibilities of reverters as a class has been slight."

There is a vast difference between possibilities of reverter and the outright severance of a mineral interest for a consideration. It cannot be said that the value of mineral interests as a class has been slight. As suggested before, in the quotation from *Fawn Lake Ranch Co.* v. *Cumbow, supra,* the mineral interest may form the most valuable part of the land.

To date, the exact question involved herein has been considered by only one intermediate appellate court. In *Bickel* v. *Fairchild,* 83 Mich.App. 467, 268 N.W.2d 881 (1978), the Michigan Dormant Mineral Act was declared unconstitutional. The Act provided that a severed oil and gas interest would be deemed abandoned unless during any 20-year period the holder of the interest had secured period the holder of the interest had secured a drilling permit, produced oil or gas, transferred the interest, used the property for underground gas storage, or recorded a notice of interest. A 3-year grace period was provided by the Act, which became effective in 1963, for persons to record notice to preserve their interest.

The observations of that court are pertinent herein: "We agree with appellants that in our energy short and energy conscious generation, the legislative act has a real public purpose—to encourage exploration and drilling of new gas and oil wells. Some oil and gas rights, with the passage of time, have become fractionalized and distributed among numerous owners, many who are no longer locatable and perhaps even deceased. No oil company will spend the time and expense of tracing all the possible owners down in order to do expensive exploratory drilling with no guarantee of favorable results.

"On the other hand, the gas and oil interest holders have a property right given them by private publicly recorded contracts. These rights are subject to being sold, mortgaged, leased, devised or inherited just as the surface rights are. Whose rights are paramount, the state's or the individual's?"

Appellees refer to a Virginia case, *Love* v. *Lynchburg National Bank & Trust Co.*, 205 Va. 860, 140 S.E.2d 650 (1965), as supporting their position. It is true, in that case a statute extinguishing mineral interests was held to be constitutional. That case, however, is distinguishable. There, the statute merely created a presumption there were no minerals in the land if the claim was not exercised for 35 years. Further, the interest holder was permitted 6 months after being sued to discover minerals. The Virginia court determined the statute did not operate to divest any property rights. It merely provided a rule of evidence. If there were no minerals, there could be no mineral interest. The court also held the statute did not constitute special legislation, stating: "The legislation is general and impartial in its operation on all person and land similarly situated."

In the case before us, the statute deprives known property owners of their subsurface rights without notice, hearing, or compensation. The statute was passed in 1967. It declared the mineral rights shall have been abandoned unless the record owner had publicly exercised ownership rights, as defined in the

statute, within 23 years immediately prior to the filing of an action to cancel the severed mineral interest of record. No notice of any nature was given to the record owner of a mineral interest.

A limited statute of limitations was provided. In any action filed within 2 years after October 23, 1967, the owner of a severed mineral interest could enter an appearance and assert his interest. He would then be deemed to have timely and publicly exercised his right of ownership. In other words, the record title owners were required within 2 years from October 23, 1967, to take some affirmative action or lose their property. In all actions filed after October 23, 1969, if no affirmative action had been taken within 23 years, the severed interest is to be considered abandoned. The owner does not have any remedy. The statute, insofar as it attempts to operate retroactively, is unconstitutional as violative of the due process and contract clauses of the United States and the Nebraska Constitutions.

The judgment of the District Court is reversed and the cause remanded with direction to find sections 57-228, 57-229, 57-230, and 57-231, R.R.S.1943, unconstitutional insofar as those statutes may be interpreted to be retroactive in their operation.

REVERSED AND REMANDED WITH DIRECTIONS.

No. 80-965

Office-Supreme Court, U.S.
FILED
APR 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENT,

Appellants,

vs.

LOUISE F. SHORT,

Appellee,

STATE OF INDIANA,

Intervenor.

JOINT APPENDIX

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Joint Appendix signed by:

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RELEVANT DOCKET ENTRIES OF
GIBSON CIRCUIT COURT
(Omitting Captions and Signatures)

June 6, 1977 - Comes now Johnson, Carroll & Griffith and enters their appearance as attorneys for all defendants

July 22, 1977 - Comes now the Defendants by counsel, and file Answer.

Aug. 16, 1977 - Plaintiff files answer to defendants' Count VIII, Cross-Complaint for Declaratory Judgment in one pleading paragraph, and answer to defendants' Count IX, Counter-Claim to Quiet Title, in two pleading paragraphs.

Sept. 19, 1977 - Comes now the State of Ind. by counsel and enters their appearance in the above entitled cause of action.

Sept. 18, 1978 - Comes now the plaintiff, by counsel, and come now the defendants, by counsel, same now comes on for judgment by the Court, without the intervention of a jury. And now the Court finds: H.I. IT IS THEREFORE CONSIDERED, ORDERED ADJUDGED AND DECREED that judgment herein be entered in accordance with the aforementioned Findings of Facts and Conclusions of Law and that plaintiff take nothing by her complaint, that defendants are entitled to relief as set forth herein and that the plaintiff pay the costs of this action.

10-27-78 - Comes now the plaintiff, by counsel, and files Motion to Correct Errors.

11-06-78 - The Court overrules Plaintiff's Motion to Correct Errors.

11-08-78 - The Court having had brought to its attention that a typographical error in its Judgment Entry of September 18, 1978 was made, causing the same not to conform to the Stipulation of Facts, now corrects Conclusion of Law (D) to make the same conform with numbered paragraph ten (10) of the Stipulation of Facts and to provide that an undivided 1/16 interest in the oil, gas, and other minerals described in said Conclusion of Law (D) is vested in the defendants O. T. Brazelton, Jr. and Robert E. Brazelton rather than an undivided 1/6.

11-20-78 - Plaintiff files Praecipe for Transcript of the Record for use on appeal to the Indiana Supreme Court.

10-16-80 - Come the parties by counsel, and the Court now receives a certified copy of the Opinion of the Supreme Court of Indiana issued in this cause on June 23, 1980, which is in words and figures following, to-wit: (H.I.) And the Court now does vacate the judgment heretofore entered and in lieu thereof enters the following conclusions of law and judgment: (HERE COPY) and the Court orders that the defendants shall pay the costs of this action. (EF)

RELEVANT DOCKET OF ENTRIES OF THE SUPREME COURT OF INDIANA
(Omitting Captions and Signatures)

1979, Jan. 18 - Record of Proceedings Filed

1980, Jan. 8 - Order Court Grants consolidated Oral Argument to be held in Supreme Court on Tues. Jan. 29, 1980 at 1:30 p.m.

1980, June 23 - 1980 TERM - JUDGMENTS REVERSED AND CAUSES REMANDED FOR ENFORCEMENT OF THE ACT - DeBRULER, J.; GIVAN, CJ, HUNTER, PRENTICE and PIVARNIK, JJ, CONCUR.

1980, July 12 - Appellee's Petition for Rehearing

1980, September 24 - Petition for Rehearing Denied. Givan, C.J.

COMPLAINT FOR DECLARATORY JUDGMENT
(Omitting Captions and Signatures)

Plaintiff complains of defendants, and each of them, and says:

1. By Executor's Deed, dated October 29, 1974, Deed Dr. 2, Card 8844, office of the Recorder of Gibson County, Indiana, plaintiff acquired ownership of the following land in Gibson County, Indiana, to-wit:

> The east half of the southwest quarter of Section twenty-nine (29), Township two (2) south, Range eleven (11) west, containing eighty (80) acres, more or less;
>
> ALSO, a part of the west half of the southwest quarter of Section twenty-nine (29), Township two (2) south, Range eleven (11) west, and more particularly described as follows:
>
> Beginning at the northeast corner of said half quarter section and running thence south one hundred four (104) rods; thence west to the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, and containing fifty-two (52) acres, more or less, and
>
> containing in all one hundred thirty-two (132) acres, more or less; SUBJECT TO THE FOLLOWING:
>
> The rights, if any, of the Grantees and their successors and assigns, under the following Mineral

Deeds:

(a) An undivided one-half interest in and to all of the oil, gas and other minerals, EXCEPT COAL, conveyed by John T. Mounts and Bessie Mounts, husband and wife, as Grantors, to Bur-Kan Petroleum Company, as Grantee, by mineral deed dated April 9, 1942, recorded in Deed Record 115, page 197, office of the Recorder of Gibson County, Indiana.

(b) An undivided three-sixteenth (3/16) interest in and to all of the oil, gas and other minerals, conveyed by John T. Mounts and Bessie Mounts, his wife, as Grantors, to Victor C. Besing, by Mineral Deed dated July 7th., 1944, recorded in Deed Record 120, page 17, Office of said Recorder;

(c) An undivided one-thirty-second (1/32) interest in and to all of the oil, gas and other minerals, conveyed by John T. Mounts and Bessie Mounts, his wife, as Grantors, to Electra Fields, as Grantee, by mineral deed dated July _____, 1944, recorded in Deed Record 120, page 46, office of said Recorders;

and SUBJECT to existing rights-of-way and easements; and remains, to this date, in possession and ownership of said real estate by virtue of said deed.

2. The defendants, TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRAZELTON, CLIFFORD M. BRASELTON and OSBORNE T. BRAZELTON, JR., have

asserted and are presently asserting a claim of ownership of undivided mineral interests in plaintiff's land by virtue of the mineral deeds referred to in numbered paragraph 1 above, the exact nature and extent of which interests in unknown to this plaintiff.

3. The defendants, D. W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENTS, and DeBEERS DIAMOND INVESTMENT, LTD., are claiming and asserting leasehold interests in the oil and gas underlying plaintiff's real estate by virtue of one or more oil and gas leases taken and obtained from one or more of the other defendants.

4. The mineral interests evidenced by the mineral deeds referred to in numbered paragraph 1 above were not used within the meaning of I.C. 32-5-11-3 for a period of more than twenty (20) years prior to April 28, 1977, and for a period of twenty (20) years prior to September 2, 1971, the effective date of Public Law 423 of the Acts of the Indiana General Assembly of 1971.

5. None of the defendants, within the time provided by said Public Law 423 (I.C. 32-5-11-4), filed a statement of claim with regard to their mineral interests and non has done so to this date.

6. This plaintiff gave notice to the defendants, TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRAZELTON, CLIFFORD M. BRASELTON and OSBORNE T. BRAZELTON, JR., of the lapse of their mineral interest under Public Law 423 of 1971 in accordance with I.C. 32-5-11-6, on April 28, 1977, and recorded a proof of service thereof in the Gibson County Dormant Mineral Interest Record in accordance with I.C. 32-5-11-7. Dr. 2, Card 9226, within 10 days thereafter.

7. Defendants are threatening to engage in oil and gas development on plaintiff's land without plaintiff's permission or consent under the claim and contention that they hold and are entitled to develop valid undivided mineral interests in plaintiff's lands. Plaintiff contends that said undivided mineral interests have been extinguished or lapsed under the provisions of Public Law 423 of the Acts of the Indiana General Assembly

of 1971.

8. A controversy exists between the parties concerning the construction, validity and effect of Public Law 423 of the Acts of the Indiana General Assembly of 1971, which controversy is real and no other adequate or appropriate remedy exists.

WHEREFORE, plaintiff prays that the Court declare the rights, status and other legal relations between the plaintiff and defendants with respect to plaintiff's land and the effect of Public Law 423 on defendants' alleged mineral interests therein, and declare said mineral interests, and each of them, permanently and absolutely lapsed and extinguished, and further declare that plaintiff has succeeded to said interests as the present owner of the interest out of which said mineral interests were carved, for her costs, and for all other proper relief.

S/Louise F. Short

Louise F. Short

HALL, PARTENHEIMER & LUECKING

By S/Verner P. Partenheimer, Jr.

Verner P. Partenheimer, Jr.
P. O. Box 313, 219 N. Hart St.
Princeton, IN 47670
Tel. (812) 385-5831
ATTORNEYS FOR PLAINTIFF

I hereby affirm under the penalty for perjury that I have read the above and foregoing complaint for declaratory judgment and that the allegations thereof are true.

S/Louise F. Short

Louise F. Short

Paragraph One

ANSWER TO COUNT VIII
CROSS-COMPLAINT FOR DECLARATORY JUDGMENT
(Omitting Captions and Signatures)

The plaintiff in the above entitled cause for her answer to defendants' "Count VIII. Cross-Complaint for Declaratory Judgment", says:

Plaintiff denies the allegations of rhetorical paragraphs 1, 2, 3, 4, 5 and 6 of Count VIII, and admits that a controversy exists between the parties concerning the construction, validity and effect of Public Law 423, 1971 Act, which controversy is real and no other adequate or appropriate remedy exists for the determination thereof.

WHEREFORE, plaintiff prays that the defendants take nothing by virtue of Count VIII.

Paragraph Two

PLAINTIFF'S FIRST ANSWER TO COUNT IX
COUNTER-CLAIM TO QUIET TITLE

Plaintiff, for her first answer to defendants' Count IX, Counter-Claim to Quiet Title, says that said counter-claim fails to state a claim upon which relief can be granted.

WHEREFORE, plaintiff prays that the defendants take nothing by virtue of Count IX.

Paragraph Three

PLAINTIFF'S SECOND ANSWER TO COUNT IX
COUNTER-CLAIM TO QUIET TITLE

Plaintiff, for her second answer to defendants' Count IX. Counter-claim to Quiet Title, says that she denies the

material allegations of rhetorical paragraphs 1, 2, 3, 4 and 6 of said Count IX and admits the allegations of rhetorical paragraph 5 so far as said paragraph alleges that the plaintiff claims to own the mineral interest described in said Count IX, but denies the same insofar as said paragraph alleges that plaintiff's claim is without right and unfounded.

WHEREFORE, plaintiff prays that defendants take nothing by virtue of Count IX.

HALL, PARTENHEIMER & LUECKING

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office mail box in Princeton, Indiana, on the _____ day of _____, 19_____.

ANSWER OF DEFENDANTS

COUNT I.

The defendants for Answer to plaintiff's complaint say:

1. They are without information as to rhetorical paragraph 1 of plaintiff's complaint.

2. They admit the allegations contained in rhetorical paragraph 2 of plaintiff's complaint.

3. They admit the allegations contained in rhetorical paragraph 3 of plaintiff's complaint, except that the interest of DeBeer's Diamond Investment, Ltd. has now been fully assigned and conveyed to the defendant, D. W. Mayhew d/b/a

Mayhew Oil and Gas Development as shown by Instrument No. 59314, recorded in Drawer No. 2, Card 9496 in the office of the Recorder of Gibson County, Indiana.

4. The defendants deny the allegations contained in rhetorical paragraph 4 of plaintiff's complaint.

5. The defendants deny the allegations contained in rhetorical paragraph 5 of plaintiff's complaint.

6. The defendants deny the allegations contained in rhetorical paragraph 6 of plaintiff's complaint.

7. The defendants admit the first sentence of rhetorical paragraph 7 of plaintiff's complaint and deny the remainder thereof. Such defendants specifically deny that their mineral interests have been extinguished or lapsed.

8. The defendants admit the allegations contained in rhetorical paragraph 8 of plaintiff's complaint.

WHEREFORE, the defendants pray that plaintiff take nothing by her complaint and that the defendants go free with their costs.

JOHNSON, CARROLL and GRIFFITH

COUNT II.

Plaintiff's complaint fails to state a claim upon which relief can be granted.

JOHNSON, CARROLL and GRIFFITH

COUNT III.

Plaintiff has failed to join parties needed for just adjudication in that John Brazelton and Rosa G. Burkhart, heirs-at-law of Electra Fields (now deceased), were not made parties hereto.

JOHNSON, CARROLL and GRIFFITH

COUNT IV.

The defendants, Texaco, Inc., Osborne T. Brazelton, Jr., Robert Brazelton, Charles Brazelton, Chester Brazelton, Clifford Brazelton, John P. Brazelton, David Burkhart and Rosa G. Burkhart filed their Statement of Claim of Mineral Interests, which Statement of Claim of Mineral Interest was recorded June 17, 1977 as Instrument No. 59013 in Drawer No. 2, Card No. 9433 in the office of the Recorder of Gibson County, Indiana.

JOHNSON, CARROLL and GRIFFITH

COUNT V.

The defendants herein filed their Statement of Claim within two (2) years of the effective date of Indiana Code 32-5-11-1 et seq.

JOHNSON, CARROLL and GRIFFITH

COUNT VI.

Public Law 423 of the Acts of the Indiana General Assembly and Indiana Code 32-5-11 are unconstitutional and void generally and specifically as to these defendants in that such purported legislation is contrary to the following sections of the Constitution of the State of Indiana, to-wit:

(a) Article I, Section 21 providing:

> "No man's property shall be taken by law without just compensation"

(b) Article I, Section 23 providing:

"The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens"

(c) Article I, Section 24 providing:

"No ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

(d) Article I, Section 25 providing:

"No law shall be passed, taking effect of which shall be made to depend upon any authority, except as provided in this Constitution."

JOHNSON, CARROLL and GRIFFITH

COUNT VII.

Public Law 423 of the Acts of the Indiana General Assembly of 1971 and Indiana Code 32-5-11 are unconstitutional and in violation of the Constitution of the United States in the following particulars:

(a) As to the Fifth Amendment to the Constitution of the United States reading:

"No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

(b) Section 1 of the Fourteenth Amendment to the Constitution of the United States providing:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws"

JOHNSON, CARROLL and GRIFFITH

COUNT VIII.

CROSS-COMPLAINT FOR DECLARATORY JUDGMGMENT

The defendants for their Cross-Complaint seek declaratory judgment relating to the construction, validity and effect of Public Law 423 of the Acts of the Indiana General Assembly of 1971 and Indiana Code 32-5-11.

The defendants claim such legislative acts are unconstitutional in the following particulars:

1. Article I, Section 21 of the Constitution of the State of Indiana providing:

   (a) "No man's property shall be taken by law without just compensation;"

2. Article I, Section 23 of the Constitution of the State of Indiana providing:

   (a) "The General Assembly shall not grant to any citizen or class of citizens privileges and immunities which, upon the same terms, shall not equally belong to all citizens"

3. Article I, Section 24 of the Constitution of the State of Indiana providing:

   (a) "No ex post facto law, or law impairing the obligation of contracts, shall ever be passed."

4. Article I, Section 25 of the Constitution of the State of Indiana providing:

   (a) "No law shall be passed, taking effect of which shall be made to depend upon any authority, except as provided in this Constitution."

5. As to the Fifth Amendment of the Constitution of the United States reading:

   (a) "No person shall be . . . deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

6. As to the Fourteenth Amendment to the Constitution of the United States reading:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws"

A controversy exists between the parties concerning the construction, validity and effect of such Acts as shown by

plaintiff's complaint, which controversy is real and no other adequate or appropriate remedy exists for the determination thereof.

WHEREFORE, defendants pray the Court that this Court declare the rights, status and other legal obligations between the plaintiff and the defendants with respect to the interest of the defendants in and to real estate described in plaintiff's complaint and the fact that Public Law 423 of the Acts of the Indiana General Assembly of 1971 and of Indiana Code 32-5-11 are unconstitutional, and declare that the interest of the defendants have not been abrogated, abolished, lapsed or extinguished by virtue of such laws.

JOHNSON, CARROLL and GRIFFITH

COUNT IX.

COUNTER-CLAIM TO QUIET TITLE

The defendants show to the Court as follows:

1. The defendants Charles Brazelton, Chester Brazelton, Robert E. Brazelton, Clifford M. Brazelton, Osborne T. Brazelton, Jr., John Brazelton and Rosa G. Burkhart, together with Texaco, Inc. are the owners collectively of an undivided 23/32's fee simple interest in and to all oil, gas and other minerals except coal upon and under the following described real estate situated in Gibson County, State of Indiana, to-wit:

> The east half of the southwest quarter of Section twenty-nine (29), Township two (2) south, Range eleven (11) west, containing eighty (80) acres, more or less;
>
> ALSO, a part of the west half of the southwest quarter of Section twenty-nine (29), Township two (2) south, Range eleven (11) west, and more particularly described as follows:

Beginning at the northeast corner of said half quarter section and running thence south one hundred four (104) rods; thence west to the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, and containing fifty-two (52) acres, more or less, and

containing in all one hundred thirty-two (132) acres, more or less; SUBJECT TO THE FOLLOWING:

The rights of the Defendants and their successors and assigns, arising under the following Mineral Deeds, granted by the then fee simple title holders;

(a) An undivided one-half interest in and to all of the oil, gas and other minerals, EXCEPT COAL, conveyed by John T. Mounts and Bessie Mounts, husband and wife, as Grantors, to Bur-Kan Petroleum Company, as Grantee, by mineral deed dated April 9, 1942, recorded in Deed Record 115, page 197, office of the Recorder of Gibson County, Indiana.

(b) An undivided three-sixteenth (3/16) interest in and to all of the oil, gas and other minerals, conveyed by John T. Mounts and Bessie Mounts, his wife, as Grantors, to Victor C. Besing, by Mineral Deed dated July 7th, 1944, recorded in Deed Record 120, page 17, Office of said Recorder;

(c) An undivided one-thirty-second (1/32) interest in and to all of the oil, gas and other minerals, conveyed by John T. Mounts and

Bessie Mounts, his wife, as Grantors, to Electra Fields, as Grantee, by mineral deed dated July _____, 1944, recorded in Deed Record 120, page 46, office of said Recorder;

and SUBJECT to existing rights-of-way and easements;

2. Texaco, Inc. owns a 16/32 mineral interest therein, Osborne T. Brazelton, Jr. owns a 2/32 mineral interest therein, Robert E. Brazelton owns a 4/32 mineral interest therein, and Robert E. Brazelton, Charles Brazelton, Chester Brazelton, Clifford Brazelton, Osborne T. Brazelton, Jr., John Brazelton and Rosa G. Burkhart, being heirs-at-law of Electra Fields, deceased, own a 1/32 undivided mineral interest therein.

3. The defendant, D. W. Mayhew d/b/a Mayhew Oil and Gas Developments is the owner of valid oil and gas leases from the aforementioned defendants, which leases are recorded as follows:

(a) Instrument No. 57573 in Drawer No. 2, Card 9074 on April 15, 1977, Office of Recorder of Gibson County, Indiana, from O. T. Brazelton, Jr. and Jane L. Brazelton, his wife;

(b) Instrument No. 57572 in Drawer No. 2, Card 9073 on April 15, 1977, Office of Recorder of Gibson County, Indiana, from Clifford M. Brazelton and Ellen Brazelton, his wife;

(c) Instrument No. 57570 in Drawer No. 2, Card 9071 on April 15, 1977, Office of Recorder of Gibson County, Indiana, from Charles Brazelton and Marjorie Brazelton, his wife; and Chester Braselton and Roselyn Braselton, his wife;

(d) Instrument No. 57571 in Drawer No. 2, Card 9072 on April 15, 1977, Office of Recorder

of Gibson County, Indiana, from Robert E. Brazelton and Marcia J. Brazelton, his wife;

(e) Instrument No. 58788 in Drawer No. 2, Card 9370 on June 9, 1977, Office of Recorder of Gibson County, Indiana, from John P. Braselton and Jane E. Braselton, his wife;

(f) Instrument No. 57879 in Drawer No. 2, Card 9155 on April 29, 1977, Office of Recorder of Gibson County, Indiana, from Texaco, Inc., a corporation.

4. The plaintiff purchased said real estate with full knowledge of the interests of the defendants herein and subject to such interests.

5. The plaintiff claims such mineral rights as are owned and leased by the defendants and denies the validity of defendants interest therein, which claim and denial is without right and unfounded.

6. The title of the defendants in and to such mineral rights and leases should be quieted.

WHEREFORE, defendants pray for judgment quieting title of the defendants in and to the mineral rights and mineral leases owned by the defendants as above set forth of and from the plaintiff and for all other just and proper relief.

JOHNSON, CARROLL and GRIFFITH

CERTIFICATE

This is to certify that I served a copy of this pleading or paper personally or by mail upon each attorney or firm of attorneys appearing of record for each adverse party on or before the filing date thereof.

Dated this 21st day of July 1977
JOHNSON, CARROLL & GRIFFITH

By S/John L. Carroll

STIPULATION OF FACTS
(Omitting Captions and Signatures)

It is stipulated by and between the parties hereto that for purposes of the within cause, the following facts shall be accepted as true without the necessity of supporting proof thereon:

1. On April 19, 1942, and prior thereto, John T. Mounts and Bessie Mounts were the owners of the following described real estate in Gibson County, State of Indiana, to-wit:

> The East half of the Southwest Quarter of Section 29, Township 2 South, Range 11 West containing 80 acres, more or less.
>
> ALSO, a part of the West half of the Southwest Quarter of Section 29, Township 2 South, Range 11 West, and more particularly described as follows:
>
> Beginning at the northeast corner of said half quarter section and running thence south 104 rods, thence west of the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, and containing 52 acres, more or less, and
>
> Containing in all 132 acres, more or less.

(hereinafter referred to as the "Real Estate".)

2. On or about April 9, 1942, John T. Mounts and Bessie Mounts, being the then owners of the Real Estate, executed and delivered a Mineral Deed to Bur-Kan Petroleum Company of Tulsa, Oklahoma conveying

> "an undivided One half, (½) interest in and to all of the oil, gas and other minerals except coal in and under and that may be produced from" the Real Estate, "together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands for oil, gas and other minerals and storing, handling, transporting and marketing the same therefrom with the right to remove from said land all of Grantee's property and improvements.
>
> "This sale is made subject to all rights now existing to any lessee or assigns under valid and subsisting oil and gas lease of record heretofore executed; being understood and agreed that said Grantee shall have, receive and enjoy the herein granted undivided interest in and to all bonuses, rents, royalties and other benefits which may accrue thereunder from and after the date hereof, precisely as if the Grantee herein had been at the date of the making of said lease the owner of a similar undivided interest in and to the lands described and Grantee one of the lessors therein.
>
> "Grantor agrees to execute such further assurances as may be requisite for the full and complete enjoyment of the rights herein granted and like-

wise agrees that Grantee shall have the right at any time to redeem for said Grantor by payment, any mortgage taxes or other liens on the above described land, upon default in payment by Grantor and be subrogated to the rights of the holder thereof.

"TO HAVE AND TO HOLD the above described property and easements with all and singular the rights, privileges and appurtenances thereunto and in anywise belonging to said Grantee herein, his heirs, successors and assigns forever, the Grantors do hereby bind themselves, heirs, successors, administrators, successors and assigns to warrant and forever defend all and singular the said property unto the said Grantee herein his heirs, successors and assigns against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

"And the undersigned grantors, for themselves and their heirs, successors, and assigns hereby waive and release all right of dower and homestead in the premises described herein, insofar as said right of dower and homestead may in any way effect the purpose for which this instrument is made, as recited herein."

Which Mineral Deed was recorded April 23, 1942 in Deed Record Book 115, at page 197 in the office of the Recorder of Gibson County, Indiana.

3. On or about July 7, 1944, John T. Mounts and Bessie Mounts, being the then owners of the Real Estate executed and delivered a Mineral Deed to Victor C. Besing conveying "an undivided 3/16 interest in and to all of the oil, gas and other minerals in and under that may be produced from" the Real Estate. Such Mineral Deed used the same language of conveyance as is set forth in the quoted portions of paragraph 2 hereof, and which Mineral Deed was recorded July 8, 1944,

in Deed Record Book 120, at page 17, in the office of the Recorder of Gibson County, Indiana.

4. On or about the _____ day of July, 1944, John T. Mounts and Bessie Mounts, being the then owners of the Real Estate executed and delivered a Mineral Deed to Electra Fields, conveying an undivided 1/32 interest in and to all of the oil, gas and other minerals in and under that may be produced from the Real Estate. Such Mineral Deed used the same language of conveyance as is set forth in the quoted portion of paragraph 2 hereof, and which Mineral Deed was recorded July 17, 1944 in Deed Record Book 120, at page 46 in the office of the Recorder of Gibson County, Indiana.

5. On April 20, 1942, Bur-Kan Petroleum conveyed by Mineral Deed its undivided ½ interest in the Real Estate as set forth in paragraph 2 above to the Texas Company of Tulsa, Oklahoma, which conveyance was recorded August 19, 1942 in Deed Record Book 115, at page 502 in the office of the Recorder of Gibson County, Indiana.

6. On July 7, 1944, Victor C. Besing and wife conveyed by two Mineral Deeds an undivided 2/16 interest in and to all of the oil, gas and other minerals from the Real Estate to O. T. and Laura I. Brazelton, both Mineral Deeds dated July 7, 1944, and recorded July 17, 1944 in Deed Record Book 120, at page 47, and Deed Record Book 120, at page 49, in the office of the Recorder of Gibson County, Indiana.

7. On July 7, 1944, Victor C. Besing and wife conveyed by Mineral Deed an undivided 1/16 interest in and to all of the oil, gas and other minerals from the Real Estate to Robert E. Brazelton by Mineral Deed dated July 7, 1944 and recorded July 17, 1944 in Deed Record 120, page 50 in the office of the Recorder of Gibson County, Indiana.

8. On October 29, 1974, the plaintiff became the grantee in a certain Executor's Deed dated October 29, 1974 and recorded October 29, 1974 in Deed Drawer #2, Card No. 8844 in the office of the Recorder of Gibson County, Indiana, which Executor's Deed, (omitting the formal parts) reads as follows:

"THIS INDENTURE WITNESSETH, That PAUL MOUNTS, as Executor of the Estate of BESSIE

MOUNTS, Deceased, and pursuant to the order of the Gibson Circuit Court of Gibson County, in the State of Indiana, entered in Probate Order Book _____, page _____, records in the office of the Clerk of said Court, for and in consideration of the sum of SIXTY THOUSAND DOLLARS ($60,000.00), CONVEYS to LOUISE F. SHORT, of Gibson County, in the State of Indiana, the following described real estate, situate in Gibson County, in the State of Indiana, to-wit:

The east half of the southwest quarter of Section twenty-nine (29), Township two (2) south, Range eleven (11) west, containing eighty (80) acres, more or less;

ALSO, a part of the west half of the southwest quarter of Section twenty-nine (29), Township two (2) south, Range eleven (11) west, and more particularly described as follows: Beginning at the northeast corner of said half quarter section and running thence south one hundred four (104) rods; thence west to the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, containing fifty-two (52) acres, more or less, and

containing in all one hundred thirty-two (132) acres, more or less; SUBJECT TO THE FOLLOWING:

The rights, if any, of the Grantees and their successors and assigns, under the following Mineral Deeds:

(a) An undivided one-half interest in and to all of the oil, gas and other minerals, EXCEPT COAL, conveyed by John T. Mounts and

Bessie Mounts, husband and wife, as Grantors, to Bur-Kan Petroleum Company, as Grantee, by mineral deed dated April 9, 1942, recorded in Deed Record 115, page 197, office of the Recorder of Gibson County, Indiana.

(b) An undivided three sixteenths (3/16) interest in and to all of the oil, gas and other minerals, conveyed by John T. Mounts and Bessie Mounts, his wife, as Grantors, to Victor C. Besing, by Mineral Deed dated July 7, 1944, recorded in Deed Record 120, page 17, office of said Recorder;

(c) An undivided one-thirty-second (1/32) interest in and to all of the oil, gas and other minerals, conveyed by John T. Mounts and Bessie Mounts, his wife, as Grantors, to Electra Fields, as Grantee, by mineral deed dated July _____, 1944, recorded in Deed Record 120, page 46, office of said Recorder;

and SUBJECT to existing rights-of-way and easements."

9. By virtue of such Executor's Deed the plaintiff became the successor in interest to the rights of John T. Mounts and Bessie Mounts.

10. The defendants below are the successors in interest in and to the Mineral Deeds referred to in paragraphs 2, 3 and 4 above:

a. Texac. , Inc. - (successor in interest to the mineral interest conveyed to Bur-Kan Petroleum Company in paragraph 2 above) - an undivided one-half (½) interest

b. O. T. Brazelton, Jr. and Robert E. Brazelton - (successor in interest to part of the mineral interest conveyed to Victor C.

Besing in paragraph 3 above) - an undivided one-sixteenth (1/16) interest

c. Robert E. Brazelton
Charles Braselton
Chester Braselton
Clifford Braselton
O. T. Brazelton, Jr.
John P. Braselton
Rosa G. Burkhart - (successors in interest to the mineral interest conveyed to Electra Fields in paragraph 4 above) - an undivided one thirty-second (1/32) interest

d. Robert Braselton - (successor in interest to part of the mineral interest conveyed to Victor C. Besing in paragraph 3 above) - an undivided two-sixteenths (2/16) interest

11. The defendant D. W. Mayhew d/b/a Mayhew Oil and Gas Development is the Lessee of oil and gas leases from the defendants set forth in paragraph 10 hereof, the date of such leases and the recording thereof are as follows:

a. Grantor-Texaco, Inc., dated March 11, 1977, recorded April 29, 1977, in Drawer 2, Card 9155, in the office of the Recorder of Gibson County, Indiana;

b. Grantor-John P. Braselton and Jane E. Braselton, his wife, dated March 10, 1977, recorded June 9, 1977, in Drawer 2, Card 9370, in the office of the Recorder of Gibson County, Indiana;

c. Grantor-Charles Braselton et ux and Chester Braselton et ux, dated November 18, 1976, recorded April

15, 1977, in Drawer 2, Card 9071, in the office of the Recorder of Gibson County, Indiana;

d. Grantor-Robert E. Brazelton et ux, dated November 15, 1976, recorded April 15, 1977, in Drawer 2, Card 9072, in the office of the Recorder of Gibson County, Indiana;

e. Grantor-Clifford Braselton and Ellen Braselton, dated November 20, 1976, recorded April 15, 1977, in Drawer 2, Card 9073, in the office of the Recorder of Gibson County, Indiana;

f. Grantor-O. T. Brazelton (a/k/a O. T. Brazelton, Jr.) et ux, dated November 22, 1976, recorded April 15, 1977, in Drawer 2, Card 9074, in the office of the Recorder of Gibson County, Indiana.

12. The defendant DeBeers Diamond Investment, Ltd. has no interest in the property or subject of the within litigation, by reason of having assigned all of its right, title and interest in the leasehold estate to the defendant D. W. Mayhew d/b/a Mayhew Oil and Gas Development by instrument dated June 20, 1977, recorded June 30, 1977, in Drawer 2, Card 9496, in the office of the Recorder of Gibson County, Indiana.

13. On April 28, 1977, the plaintiff gave notice by publication in the Star-Echo, a weekly newspaper authorized to publish legal notices and published at Owensville, Indiana, a Notice of Lapse of Mineral Interest, naming therein as record owners of said interest the following:

Texaco, Inc.
Robert Braselton
Electra Fields
Charles Braselton
Chester Braselton
Robert E. Brazelton
Clifford M. Braselton
Osborn T. Brazelton, Jr.

Said persons were all the persons whose names were shown of record in the Recorder's Office of Gibson County, Indiana, on April 28, 1977, except O. T. Brazelton and Laura I. Brazelton, both of whom were deceased and whose successors in interest were O. T. Brazelton, Jr., (sometimes called Osborn T. Brazelton, Jr.), and Robert E. Brazelton. On said date, the Probate Order Book 69, page 609, in the Gibson Circuit Clerk's Office disclosed a final order in the Estate of Florence Electra Fields, a true copy of which is attached hereto as "EXHIBIT C". This order was not recorded in the Recorder's Office and no other public records in Gibson County, Indiana, showed any evidence of the ownership of the interests in question.

14. On May 6, 1977, plaintiff sent copies of said Notice of Lapse of Mineral Interest to the above named persons by regular United States mail.

15. A copy of such Notice of Lapse of Mineral Interest, published and mailed as set out in paragraphs 13 and 14, is attached hereto, made a part hereof, and marked "EXHIBIT A". Said notice, together with a publisher's affidavit and an affidavit of service by mailing, was recorded in the office of the Recorder of Gibson County, Indiana, on May 10, 1977.

16. On June 17, 1977, the defendants referred to in paragraph 10 above, filed Statement of Claim of Mineral Interest, which Statement of Claim of Mineral Interest was recorded June 17, 1977, in Drawer Number 2, Card 9433, in the office of the Recorder of Gibson County, Indiana, a copy of which is attached hereto, made a part hereof, and marked "EXHIBIT B".

17. On or about April 29, 1977, Gwendolyn Burkhart, John P. Braselton and Chester P. Braselton conveyed by quitclaim deed all of their interests in the real estate to David E. Burkhart. This deed was recorded June 7, 1977, in Deed Dr. 2, Card 1891, office of the Recorder of Gibson County, Indiana, and a true copy thereof is attached hereto as "EXHIBIT D". On June 9, 1977, David E. Burkhart filed a Statement of Claim to Prevent Lapse of Mineral Interests, dated June 8, 1977, a true copy of which is attached hereto as "EXHIBIT E". This statement was recorded in Dr. 2, Card 9366, office of the Recorder of Gibson County, Indiana.

18. The records in the office of the Recorder of Gibson County, Indiana, disclose the following oil and gas leases affecting the real estate, none of which ever resulted in the commencement of any drilling operations and which were given prior to the oil and gas leases referred to in paragraph 11 of this stipulation:

(a) Dated 7-7-50, from John T. Mounts and Bessie Mounts, husband and wife; O. T. Brazelton and Laura I. Brazelton, husband and wife; Electra Fields, widow; Robert E. Brazelton and Marcia J. Brazelton, his wife, as lessors, to Joseph J. Shulman, Jake Shulman, Isadore Shulman and Maurice R. Shulman, co-partners d/b/a Shulman Brothers, as lessee, for a term of one year and as long thereafter as oil or gas is produced. Misc. Rec. 83, page 547;

(b) Dated 7-13-51, from John T. Mounts and Bessie Mounts, his wife; O. T. Brazelton and Laura I. Brazelton, his wife; Electra Fields, widow; Robert E. Brazelton and Marcia J. Brazelton, his wife, as lessors, to Jack S. Lewis, as lessee, for a term of one year and as long thereafter as oil or gas is produced. Misc. Rec. 91, page 31;

(c) Dated 5-23-57, from Bessie Mounts, a widow; O. T. Brazelton and Laura I. Brazelton, husband and wife; Electra Fields, widow; Robert E. Brazelton and Marcia J. Brazelton, husband and wife, as lessors, to J. E. Kendall, as lessee, for a term of one year and as long thereafter as oil or gas is produced. Misc. Rec. 125, page 67;

(d) Dated 9-9-46, from John T. Mounts and Bessie Mounts, his wife, as lessors, to The Texas Company, as lessee, for a term of five years and as long thereafter as oil or gas is produced. Misc. Rec. 62, page 325;

(e) Dated 5-27-49, from John Mounts and Bessie Mounts, his wife, as lessors, to A. B. Taylor, as lessee, for a term of one year and as long thereafter as oil or gas is produced. Misc. Rec. 75, page 486;

(f) Dated 9-26-58, from Bessie Mounts, a widow; O. T. Brazelton and Laura I. Brazelton, his wife; Electra Fields, a widow; Robert E. Brazelton and Marcia J. Brazelton, his wife, as lessors, to Mayhew Oil Company, Inc., as lessor, for a term of one year and as long thereafter as oil or gas is produced. Misc. Rec. 132, page 421.

Unless the issuance, delivery and recording of the above oil and gas leases constitute such use, the mineral interest of the defendants in the real estate were not used within the meaning of IC 32-5-11-1 and IC 32-5-11-3 for the 20-year period immediately preceding September 2, 1971, or for the 2-year period commencing on said date.

19. At no time during the period September 2, 1971, to September 3, 1973, were the defendants, or any of them, the owners of ten (10) or more mineral interests as defined in IC 32-5-11-2 in Gibson County, Indiana.

20. John P. Braselton, David E. Burkhart and Rosa G. Burkhart have appeared by counsel, waived service of process and filed pleadings, and this Court has jurisdiction of the said John P. Braselton, David E. Burkhart and Rosa G. Burkhart, as well as of all other parties in interest.

21. Defendants desire to engage in oil and gas development on the real estate without plaintiff's permission or consent, and plaintiff desires to engage in oil and gas development on said real estate to the exclusion of the defendants, and a controversy exists between the plaintiff and the defendants concerning the construction, validity and effect of Public Law 423 of the Acts of the Indiana General Assembly of 1971, which controversy is real and substantial.

22. The plaintiff, Louise F. Short, is now and has been at all times since October 29, 1974, the owner of the land

described in paragraph 8 above, except approximately 2-1/4 acres conveyed to James and Mary Boyles by warranty deed, dated March 27, 1976, recorded in Deed Dr. 2, Card 11302, office of the Recorder of Gibson County, Indiana.

23. This stipulation shall constitute all of the evidence in this cause.

JOHNSON, CARROLL AND GRIFFITH

ATTORNEYS FOR DEFENDANTS TEXACO, INC., ROBERT BRASELTON, CHARLES BRASELTON, ROBERT E. BRAZELTON, CLIFFORD M. BRASELTON, OSBORNE T. BRAZELTON, JR., D. W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENTS, and DeBEERS DIAMOND INVESTMENT, LTD.

FINE, HATFIELD, SPARRENBERGER & FINE

ATTORNEYS FOR JOHN P. BRASELTON, ROSA G. BURKHART, CHESTER BRASELTON and DAVID E. BURKHART

HALL, PARTENHEIMER & LUECKING

ATTORNEYS FOR PLAINTIFF

PUBLISHER'S AFFIDAVIT

State of Indiana, County of Gibson, ss:

On this 30th day of April, 1977, personally appeared Phyllis A. Armstrong, publisher of the Star-Echo, a weekly newspaper published at Owensville, Ind., who, being sworn, states that the notice, a true copy of which is attached, was published one successive times in said paper, the first publication being on 4/28/77.

S/ Phyllis Armstrong

Phyllis Armstrong, Publisher

Subscribed and sworn to before me, this 30th day of April, 1977.

S/ Eugenia Ruth Robinson

Notary Public

My Commission expired July 13, 1979

RECORDED THIS 10 DAY OF MAY, 1977 AT 11:00 A.M.

S/ Don L. Lutz

Recorder Gibson County, Indiana

NOTICE OF LAPSE OF MINERAL INTEREST

Notice is hereby given to the following record owners thereof, to-wit: Texaco, Inc., Robert Braselton, Electra Fields, Charles Braselton, Chester Braselton, Robert E. Braselton, Clifford M. Braselton, and O. T. Braselton, Jr., that they are claimants or record owners of the mineral interests evidenced by the following mineral deeds recorded in the office of the Recorder of Gibson County, Indiana, to-wit:

(1) undivided ½ interest in and to all of the oil, gas and other minerals except coal in and under the same, conveyed by John T. Mounts and Bessie Mounts, husband and wife, to Bur-Kan Petroleum Company, by Mineral Deed dated April 9, 1942, recorded in Deed Rec. 115, page 197;

(2) undivided 3/16 interest in and to all of the oil, gas and other minerals in and under and that may be produced therefrom, conveyed by John T. Mounts and Bessie Mounts, his wife, to Victor C. Besing, by Mineral Deed dated July 7, 1944, recorded in Deed Rec. 120, page 17;

(3) undivided 1/32 interest in and to all of the oil, gas and other minerals in and under and that may be produced therefrom, conveyed by John T. Mounts and Bessie Mounts, his wife, to Electra Fields, by Mineral Deed dated July _____, 1944, recorded in Deed Rec. 120, page 46;

In and to the following land in Gibson County, Indiana, to-wit: The East half of the southwest quarter of Section 29, township 2 south, range 11 west, containing 80 acres, more or less; EXCEPT approximately 2-1/4 acres, conveyed to James and Mary Boyles. (Deed Drawer 2, Card 11302) Also, a part of the west half of the southwest quarter of Section 29, township 2 south, range 11 west, and more particularly described as follows: Beginning at the northeast corner of said half quarter section and running thence south 104 rods; thence west to the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, containing 52 acres, more or less.

Notice is further given that said mineral interests have lapsed through non-use and the undersigned has succeeded to

the ownership of such interests under the provisions of Indiana Code 32-5-11-1-8.

DATED this 20th day of April, 1977.

Louise F. Short

STATEMENT OF CLAIM OF MINERAL INTEREST

The undersigned hereby files its Statement of Claim of Mineral Interest:

1. Texaco, Inc.
P. O. Box 2420
Tulsa, Oklahoma 74102

1A. An undivided one-half (1/2) interest in and to all oil, gas and all other minerals, except coal.

2. Description of the land on or under which such mineral interest is located:

The East Half of the Southwest Quarter; also part of the West half of the southwest quarter described as follows, beginning at the northeast corner of said half quarter section and running thence south 104 rods; thence west to the west line of said half quarter section; thence north to the northwest corner thereof; thence east to place of beginning, all Sec. 29 T2S, R 11 W, containing 132 acres, more or less.

ALSO:
12 acres off the South end of the E-1/2 of the NW-1/4 of Section 29, and described as follows: Commencing at the SW corner of said half quarter section and running thence East to the East line of said East half quarter section; thence North 24 rods; thence West to the West line of said half quarter section; thence South to the place of beginning;

also 28 acres, more or less, off the South side of the W-1/2 of the SW-1/4 of Section 29, excepting therefrom one-fourth of an acre, more or less, used as a cemetery;

also 35-1/2 acres off the South side of the W-1/2 of the SE-1/4 of Section 30, described as follows: Beginning at the SW corner of the SE-1/4 and thence running North 71 rods; thence East 80 rods, more or less, to the East line of said W-1/2 of the SE-1/4; thence South to the South line of said SE-1/4 section; thence West to the place of beginning;

also a strip one rod wide, described as follows: Beginning at the NE corner of the W-1/2 of the SE-1/4 of Section 30; thence West one rod; thence South 89 rods, more or less, to the North line of the 35-1/2 acre tract of land last above described; thence East one rod; thence North to the place of beginning;

also the E-1/2 of the SE-1/4 of Section 30, containing 80 acres, more or less; and,

also two acres, more or less, off the North end of the NE-1/4 of the NE-1/4 of Section 31, described as follows: Beginning at the NE corner of said Section 31 and running thence South four rods to a stone; thence West 80 rods; thence North 4 rods; thence East on the section line 80 rods, more or less, to the place of beginning.

All of the above lands lying in Township 2 South, Range 11 West, Gibson County, Indiana.

DATED this 16th day of June, 1977.

TEXACO, INC.

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)

Before me, a Notary Public in and for said County and State, personally appeared JOHN L. CARROLL, as attorney for Texaco, Inc., who as such attorney is duly authorized by Texaco, Inc. to execute the above document and verify the statement of facts therein contained.

WITNESS, my hand and Notarial Seal this 16th day of June, 1977.

My commission expires:
February 3, 1981

S/Dana L. West
Dana L. West Notary Public

JOHNSON, CARROLL AND GRIFFITH
Professional Corporation
2230 West Franklin Street
Evansville, Indiana 47712
Telephone: (812) 425-4466
#27

This instrument prepared by: John L. Carroll of the firm of Johnson, Carroll and Griffith, Attorneys, Evansville, Indiana.
#27

RECORDED THIS 17 DAY OF JUNE, 1977 at 3:17 P.M.

S/Don L. Lutz
Don L. Lutz Recorder Gibson County, Indiana

RECEIVED FOR RECORD
This 17 day of June A.D., 1977 of
3:17 o'clock p.m.
Drawer No. 2
Card No. 9435

Don L. Lutz
Recorder of Gibson County

IN RE:	)	FILED
	)	Feb. 7 1968
Estate of FLORENCE ELECTRA	)	
FIELDS, Deceased,	)	Don L. Lutz
	)	Clerk Gibson
W. PAUL BRASELTON,	)	Circuit Court
Administrator.	)	
	)	Estate No. PR-67-69

ENTRY

Comes now W. Paul Braselton, as Administrator of the Estate of Florence Electra Fields, Deceased, and presents to the Court his duly verified Final Account and Petition (1) To Settle and Allow Account; (2) To Determine Heirship; and (3) For A Decree That The Estate Has Been Fully And Finally Administered, heretofore filed herein January 12, 1968, and endorsed for hearing on February 3, 1968.

The Court, having seen and examined said Account and Petition and being duly advised in the premises, finds as follows:

1. No objections were filed to the Final Account and Petition of the Administrator.

2. Due notice of the filing of said Account and Petition was given to all interested persons and the same is now properly before the Court for final action thereon.

3. More than six (6) months have elapsed since the date of the first publication of notice to all interested parties herein. All of the debts and liabilities of the decedent and of her estate have been paid and discharged. Neither the decedent nor this Administrator was an employer of labor as that term is defined in the Indiana Employment Security Act.

4. This Court has entered an order finding that the estate is not subject to Indiana inheritance tax. The estate was not subject to federal estate tax.

5. All of the assets of the estate have been administered and no reason exists why this estate can not be closed at this time.

6. The Administrator is chargeable and claims credits for expenditures in the administration of said estate and in distribution as follows:

To Inventory and Appraisement	$1,591.38
Receipts During Administration	1,039.35
Total Chargeable	$2,630.73
Less Credits	2,630.73
Balance	0.00

7. Florence Electra Fields was, at the time of her death, a widow and left surviving her as her sole and only heirs-at-law her brother, W. Paul Braselton, and the following nieces and nephews, namely: Gwendolyn Burkhart, Chester P. Braselton and John Braselton, the children of Chester Braselton, a deceased brother; Charles Braselton and Clifford Braselton, the children of Clifford Braselton, a deceased brother; and Robert Brazelton and Osborne T. Brazelton, Jr., the children of Osborne T. Brazelton, a deceased brother.

8. The decedent died seized and possessed of an undivided one thirty-second (1/32) interest in and to the oil, gas, casinghead gas and other minerals lying in and under and that may be produced from the following described real estate, situate in Gibson County, State of Indiana, to-wit:

> Part of the west one-half of the northeast quarter of Section 30, Township 2 south, Range 11 west, bounded as follows, to-wit: Beginning at the southeast corner of said half quarter section and from thence running north 42 chains (two poles to chain); thence west 27 chains and 21 links; thence south 42 chains; thence east 27 chains and 21 links to the place of beginning, containing 28.79 acres, more or less, EXCEPTING, however, 17 acres in a rectangular form off of the north end of said tract heretofore conveyed by Flora E. Knight (now the grantor Flora E. Mosier) to Morton Woods by deed dated November 1, 1918, and recorded in Deed Record 84,

at page 369 of the Deed Records of Gibson County, in the State of Indiana;

Also, a part of the northwest quarter of Section 30, in Township 2 south, Range 11 west, bounded as follows: Beginning at the northeast corner of said quarter section; thence south to the southeast corner thereof; thence west 21 chains and 27½ links; thence north, 12 degrees west, 39 chains; thence northeast to the southeast corner of Warrick Armstrong's land in said quarter section; thence north to the north line of said quarter section; thence east to the place of beginning, containing 54½ acres, more or less;

A part of the northwest quarter of Section 30, Township 2 south, Range 11 west, and bounded as follows: Beginning at the southwest corner of said quarter section and running thence east 57 chains and 35 links; thence north, 12 degrees west, 39 chains to Columbus Emmerson's line; thence west along his line 49 3/4 chains to the Range line; thence south 38 chains and 15 links to the beginning, containing 51.43 acres;

for a term of twenty-five (25) years from and next after February 5, 1944, see Deed Record 119, page 82, records in the office of the Recorder of said County and State. Certain of said real estate has been developed for the production of oil and gas, and The Superior Oil Company, Post Office Box 1521, Houston, Texas, 77001, is purchasing the oil therefrom under Property No. 13061720, Owners No. 54164. It was not necessary in the administration of said estate to sell or dispose of said royalty interest, and the title thereto and the royalty interest formerly attributable to Florence Electra Fields, the decedent, is now owned by, and payments therefrom for the remainder of the term should be made to, the following persons and in the following proportions:

W. Paul Braselton	1/4
Chester P. Braselton	1/12
Gwendolyn Burkhart	1/12
John Braselton	1/12
Charles Braselton	1/8
Clifford Braselton	1/8
Robert E. Brazelton	1/8
Osborne T. Brazelton, Jr.	1/8

9. The final account should be settled and allowed and the prayer of the petition should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED BY THE COURT as follows:

1) said account is hereby in all things approved, settled and confirmed, and the prayer of the petition is granted;

2) the decedent left surviving her as her sole and only heirs-at-law, her brother and the niece and nephews named in numbered paragraph 7 hereinabove;

3) the title in and to the mineral interest of which the decedent died seized and possessed is now vested in the heirs-at-law and in the proportions set forth in numbered paragraph 8 above, and said heirs-at-law are entitled to all royalty payments now accrued or hereafter accruing from the mineral interest formerly owned by the decedent and in the proportions set forth above;

4) the estate has been fully and finally administered, and the Administrator and his surety be, and they are hereby, released and discharged of and from further duties and liability herein.

REC(D: Prob. O.B. 69, p. 609

Reception No. 58737

Recorded this _____ day of _____ A.D. 19 ___, _____ o'clock _____ M.

Recorder

QUIT-CLAIM DEED

THIS INDENTURE WITNESSETH

That ROSA G. BURKHART, of Marion County, Indiana, and JOHN P. BRASELTON, of Vanderburgh County, Indiana, and CHESTER P. BRASELTON, of Gibson County, and State of Indiana.

RELEASE AND QUIT-CLAIM

To DAVID E. BURKHART, of Marion County, in the State of Indiana for the sum of One Dollar ($1.00) and other good and valuable consideration, receipt Dollars of which is hereby acknowledged, the following described REAL ESTATE in Gibson County, in the State of Indiana, to-wit: All of the southwest quarter of section 29, township 2 south, range 11 west; except, 28 acres off the south end of the southwest quarter of the southwest quarter of said section, township and range, containing after said exception 132 acres more or less.

IN WITNESS WHEREOF, The said ROSA G. BURKHART, JOHN P. BRASELTON and CHESTER P. BRASELTON, Have hereunto set their hands and seals this 29th day of April, 1977.

S/ Rosa G. Burkhart _____ (SEAL)

Rosa G. Burkhart (SEAL)

S/ John P. Braselton _____ (SEAL)

John P. Braselton (SEAL)

S/ Chester P. Braselton _____ (SEAL)

Chester P. Braselton (SEAL)

STATE OF INDIANA, Vanderburgh County, ss.

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named ROSA G. BURKHART, JOHN P. BRASELTON, and CHESTER P. BRASELTON, who acknowledged the execution of the foregoing Deed to be their voluntary act and deed.

WITNESS my hand and Notarial Seal this 29th day of April, 1977.

My commission expires:

QUIT-CLAIM DEED

_____

From

_____

_____

To

_____

_____

Received for Record

This _____ day of _____ A.D. 19 _____ at _____ o'clock _____ M. and recorded in record _____ pages _____ _____Recorder of _____ County

Recorder's Fee $_____

Duly Entered for Taxation

_____ 19 _____

_____ Auditor

Transfer Fees $2.50

FINE, HATFIELD, SPARRENBERGER & FINE
1600 Old National Bank Building
Evansville, Indiana 47708

RECEIVED FOR RECORD
This 7 day of June A.D., 1977 of
10:20 o'clock a.m.
Drawer No. 2
Card No. 1891
S/ Don L. Lutz
Recorder of Gibson County

STATEMENT OF CLAIM TO PREVENT LAPSE OF MINERAL INTERESTS

THIS INDENTURE WITNESSETH, that the undersigned, David E. Burkhart of 41 E. Hanna Avenue, Indianapolis, Indiana 46227, being the owner of an undivided interest in and to all of the oil, gas and other minerals under and in certain land located in Gibson County, Indiana, does hereby file his Statement of Claim, pursuant to IC 32-5-11-1 et seq., (formerly Burns Indiana Statutes Sec. 46-1808 et seq.) to prevent the lapse of the mineral interests described below herein which were derived from a certain quitclaim deed from Rosa G. Burkhart, John P. Braselton and Chester P. Braselton as grantors to the undersigned David E. Burkhart, as grantee dated the 29th day of April, 1977. Said mineral interests consist of an undivided interest in and to all of the oil, gas and other minerals of every kind and nature whatsoever, and together with all necessary easements appurtenant, in, under and upon the following described real estate, all located in Gibson County, Indiana, to-wit:

Parcel 1
All of the southwest quarter of section 29, township 2 south, range 11 west; except, 28 acres off the south end of the southwest quarter of the

southwest quarter of said section, township and range, containing after said exception 132 acres more or less.

Parcel 2
The East half of the southwest quarter of Section 29, township 2 south, range 11 west, containing 80 acres, more or less; EXCEPT approximately 2-¼ acres, conveyed to James and Mary Boyles. (Deed Drawer 2, Card 11302). Also, a part of the west half of the southwest quarter of Section 29, township 2 south, range 11 west, and more particularly described as follows: Beginning at the northeast corner of said half quarter section, and running thence south 104 rods; thence west to the west line of said half quarter section; thence north to the northwest corner thereof; thence east to the place of beginning, containing 52 acres, more or less.

Said mineral interests are partially derived from certain mineral deeds recorded in Deed Record 115 page 197, Deed Record 120 page 17 and Deed Record 120 page 46 all in the Office of the Recorder of Gibson County, Indiana, and also derived from certain other instruments and certain assignments thereof and other instruments all recorded in the Office of the Recorder of Gibson County, Indiana which said interests are more particularly set forth in the aforesaid instruments creating same.

Said mineral interests shall be deemed being used and are being used on the date this instrument is recorded.

IN WITNESS WHEREOF the said David E. Burkhart, of Marion County, Indiana, has hereunto set his hand and seal this 8 day of June, 1977.

S/David E. Burkhart

David E. Burkhart

STATE OF INDIANA, County of Marion, SS.

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named DAVID E. BURKHART who acknowledged the execution of the foregoing instrument to be his voluntary act and deed.

WITNESS my hand and Notarial Seal this 8th day of June, 1977.

My Commission Expires:
Dec. 8, 1977

S/Theresa R. Evans
Notary Public

This instrument was prepared by James E. Marchand, Attorney

RECORDED THIS 9 DAY OF JUNE, 1977 AT 10:15 A.M.

RECEIVED FOR RECORD
This 9 day of June A.D., 1977 at
10:15 o'clock A.M.
Drawer No. 2
Card No. 9366
S/Don L. Lutz
Recorder of Gibson County

Office-Supreme Court, U.S.
FILED
JAN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-965

IN THE

United States Supreme Court

OCTOBER TERM, 1980

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D.W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENT,
Appellants,

v.

LOUISE F. SHORT,
Appellee,

STATE OF INDIANA,
Intervenor.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

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No. 80-965

IN THE

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OCTOBER TERM, 1980

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D.W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENT,
Appellants,

v.

LOUISE F. SHORT,
Appellee,

STATE OF INDIANA,
Intervenor.

MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

Now comes the appellee, Louise F. Short, and moves this court to dismiss or in the alternative to affirm the decision of the Indiana Supreme Court on the ground that there is no substantial federal question.

REASONS FOR AFFIRMANCE

There is no substantial federal question involved in this case. The statute here held constitutional is a marketable title statute and it operates in a manner similar to other kinds of marketable title statutes which have been upheld from almost the beginning of our legal system.

It provides for the termination of interests which have been split off from the residuary interest in land. Termination occurs because the owner of the interest has failed to manifest a desire to maintain his interest for a long period of time. When termination occurs the interest is reunited with the residual interest in the land.

These kinds of statutes reflect several basic policy objectives. Their primary purpose is to prevent interests in land from being held for long periods of time by people who aren't deriving any benefit from such ownership. Such persons tend to get out of hand and unlocatable. When title questions are raised, or the property becomes valuable, it is difficult to develop or trasfer the land because the owner of such interest can't be found. Statutes such as this are needed to keep land titles marketable. See Street, *Need for Legislation to Eliminate Dormant Mineral Interests*, 42 Mich St., B.J. 49 (March 1963); Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles*, VII Land and Water L.R. (1972).

A second policy objective no doubt also involves the expectations which are developed by those who live upon and utilize the land without disturbance by those whose rights depend upon a fragmentation of the title which occurred years earlier. This was eloquently expressed by Mr. Justice Holmes in defending the operation of statutes of limitations. He said:

> Man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings and when the roots have grown to a certain size, cannot be displaced without cutting at his life. (Lerner, *The Mind and Faith of Justice Holmes*, 417 (1953))

There are many kinds of statutes which have served these same policy objectives and they have been upheld almost without exception. Statutes of limitations are a prime example. When an owner of land fails to assert his rights against a trespasser for a prescribed period the result is a transfer of title to the trespasser. The owner of land has lost his interest because he has failed to act in a timely manner to preserve it. There is no requirement of a hearing with notice and right to be heard prior to the loss of rights. The statute is self executing. Procedural due process does not become a question until and unless a dispute arises as to the existence of the facts which brought the statute into operation. Nor was there any requirement, as is suggested by the appellant and by the cases cited by appellant from Illinois, Wisconsin, Minnesota and Nebraska, *(Wilson v. Bishop*, (1980 ILL.) 412 N.E.2d 522; *Chicago and N.W. Trans. Co. v. Pederson*, 80 Wis. 2d 566, 259 N.W. 2d 316; *Contos v. Herbst* (Minn. 1979), 278 N.W.2d 732, *Wheelock v. Heath* (1978) 201 Neb. 835, 272 N.W.2d 768), that the legislatures which initially enacted statutes of limitations serve personal notice upon every landowner in the state in order for the statute to be operative with respect to his/her land. See *Jackson v. Lamphire*, (1830) 28 U.S. 280.

Recording acts also represent an effort to keep titles marketable and they also operate in a manner similar to the statute involved in this case. A title is terminated because of a failure to record ones' title document, and once again the statute is self executing. When the facts specified in the act occur the title is lost. *Jackson v. Lamphire* (1830) 28 U.S. 280.

Many states have also adopted statutes which terminate certain kinds of future interests. A typical statute is the

Illinois Reverter act. 30 ILL. Rev. Stat. 37e et. seq. It provides that possibilities of Reverter can only last for a period of fifty years and are then terminated. The act is applicable to existing interests which were created more than 50 years before its passage. It was held to be valid. No notice and hearing were provided nor did anyone contend they were necessary. *Trustee of Schools v. Batdorf* (1955) 6 ILL. 2d 486, 130 N.E.2d 111. See also *Hiddleston v. Neb. Jewish Ed. So.* (1911) 186 Neb. 786, 186 N.W.2d 904.

The various marketable title statutes are more clearly analogous to the statute involved here. In fact they operate on mineral interest in the same manner and for much the same reason. The marketable title acts terminate interests which are inconsistent with a root of title which has been of record for a specified period. (See e.g., Ind. Code 32-1-5-1 et. seq., which provides for a 50 year period). They terminate interests which have been fragmented off from the fee, including mineral interests, if there is a conveyance of the fee which does not except them, which has been of record for a prescribed period, unless the fragment has been the subject of a conveyance recorded within that period of time. *Uniform Acts, Land Transactions, Simplification of Land Transfers, Condominiums*, 223 West Pub. Co. 1978. Thus, if the minerals were severed from the surface in 1910 and the surface was transferred in 1915 in a conveyance which simply described the land, and made no mention of the minerals, the presence on the record of the 1915 conveyance for the prescribed period would terminate the mineral interest unless the mineral interest was, itself the subject of a recorded conveyance within that period. The mineral interest is terminated when the facts specified in the act coexist and the act makes no provision for notice and hearing. The Model Marketable Title act has been adopted in a great many states and it has been upheld whenever challenged. See e.q., *City of Miami v. St. Joe Paper Co.* (Fla. 1977), 347, So.2d 622.

Statutes similar to the one involved in this case have also been upheld against constitutional attack. Statutes in Virginia (Va. code §§55-154 and 55-155), Michigan (Mich. Comp. Laws 554.291 et seq.) and Georgia (Ga. code §85-407.1) which have the same objectives as the act in the instant case have been upheld. *Love v. Lynchburg Nat. Bank* (1965) 205 VA 860, 140 S.E.2d 650; *Nelson v. Bloodworth* (Ga. 1977) 232 S.E.2d 547; *Van Slooten v. Larsen* (Mich. Sup. Ct. Docket #62256, decided Dec. 23, 1980). A statute in Florida which was very similar to the one in the instant case, except that it did not provide for a grace period for interests as to which the period had expired prior to the effective date of the act, was struck down because of the absence of the grace period but the Florida court expressed the opinion that it would have otherwise passed constitutional muster. *Trustees of Tufts Coll. v. Triple R Ranch, Inc.* (Fla. 1977) 275 So.2d 521.

In Louisiana a provision of the civil code which long predated the existence of a mineral industry in that state was held applicable to mineral interests. See Art 789 and 3546 West LA. Civ. Code Anno. (1953), (now Wests LSA Rev. Stat. §31:74 and Wests LSA Civ. Code Art. 753). That codal provision related to easements and it was held applicable because Louisiana characterized mineral interests as incorporeal interests. *Frost Johnson LBR Co. v. Sallings Heirs* (1920) 150 LA 756, 91 So. 207. (In fact so do many other states including Indiana). The codal provisions, which apply a doctrine known as liberative prescription operate to terminate any mineral interest which is non productive for a period of ten years. There is no provision for extending an interest by filing a document as is true in Indiana. The theory seems to be that the servient (surface) owners use of the surface is adverse to that of the dominant (mineral) owner, and that use continued for ten years matures a right in the servient owners to be free of the burden imposed by the mineral interest. The estate is freed of the incorporeal interest. Judging from the decided appelate cases applying the doctine (which run into the

hundreds) most mineral interests in Louisiana must be dependent upon the operation of the doctrine. Again it, and the amendments to it, are applied retroactively; see *Mire v. Hawkins* (La. 1965) 177 So.2d 795. It operates when the requisite faces coexist; and there is no notice or hearing provision.

In California the Supreme Court adopted a rule very similar to the Indiana statute by judicial decision and it did so for the purpose of effecting the very same policy objectives. *Gerhard v. Stephens* (1968) 68 Ca. 2d 864, 69 Cal. RPTR 612, 442 P.2d 692, 714. The court there held that mineral interests could be found to be abandoned in favor of the surface owner if unused for a long period of time.

The statute in the instant case thus operates no differently than countless other statutes which have similar objectives. It proceeds upon a principle that is fundamental to our system. That principle is the self executing statute. Rights can be created, transferred or terminated because the facts specified in the law coexist. Most laws in our system operate on the basis of this principle. A great deal of the property in the United States is held by virtue of the operation of marketable title statutes which utilize that principle. It is here asserted, however, that because the Indiana Supreme Court has applied that principle in upholding a statute enacted by the States' Legislatures, this court ought to take jurisdiction and decide whether that statute violates the U.S. Constitution. The principle basis for the assertion is that State Supreme Courts in Illinois, Wisconsin, Minnesota and Nebraska have struck down similar statutes. It is not disputed that those courts have advanced the proposition which appellants are asserting here. They have held that statutes similar to the one involved here are invalid because of a denial of procedural due process. The Wisconsin court in *Chicago & N.W. Trans. Co., Pederson*, 80 Wis.2d 259 N.W.2d 316 said, for example:

> "In this case, the plaintiffs mineral rights will revert to the surface owner if they are not registered or taxes paid on them. At least the plaintiffs must have a hearing where they can question the determination of the register of deeds that the registration has not been done or that the taxes have not been paid."

The Wisconsin court, and those following its lead, are clearly saying that a law cannot operate to create transfer, or terminate a right unless it makes provisions for an administrative type hearing in which the facts are found, upon the basis of which the statute is to operate. Such a proposition is, once again inconsistent with the manner in which our legal system has operated since its beginning. Most of our laws operate when the requisite facts come to coexist. If an individual desires to dispute the application of the law to him/her, he/she can have the facts determined by a court of law. It is only then that procedural due process becomes a factor. If the proposition advanced by appellants and the Illinois, Wisconsin, Minnesota, and Nebraska courts, is sustained by this court it will mean that most of the laws by which property are held in the country, certainly all of the judge made laws, are invalid. Indeed it will then mean that judges can no longer make laws unless they are given the power to set up administrative agencies to enforce them. Such a proposition is ridiculous and should not be the basis for this court's assuming jurisdiction.

There is certainly nothing in the decisions of this court which supports the proposition here advanced. Most frequently cited in support of the proposition are cases such as *Bell v. Burson* (1971) 402 U.S. 535, 91 S.Ct. 1586, and *Mullane v. Central Hanover Trust Co.* (1950) 339 U.S. 306, 94 L. Ed. 865, 70 S.Ct. 652. In the Bell case the adversaries were the government and a citizen and the right being denied was one enjoyed by all persons similarly situated. In the Mullane case a final adjudication was being made without adequate notice. It is submitted that neither of these cases nor any cited by appellants establish a proposition so for reaching or unsettling as that advanced by appellants.

CONCLUSION

It is respectfully submitted that this appeal present no substantial federal question and should be dismissed or in the alternative affirmed.

Respectfully submitted,

Vern P. Partenheimer, Jr.
Ronald W. Polston

Attorneys for Appellee

Office-Supreme Court, U.S.
FILED
JAN 28 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-965

IN THE

United States Supreme Court

OCTOBER TERM, 1980

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW, d/b/a MAYHEW OIL AND GAS DEVELOPMENT,

Appellants,

vs.

LOUISE F. SHORT,

Appellee,

STATE OF INDIANA,

Intervenor.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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P.O. Box 6016, Station B
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Telephone: (812) 425-4466
Attorneys for Appellants

Unigraphic, Inc., 1401 N. Fares Ave., Evansville, Ind. 47711. Phone 424-3680

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The thrust of Appellee's Motion to Dismiss or Affirm is that there is no substantial federal question. In support thereof, Appellee cites no cases on that issue. On the contrary, Appellee seems to say there is no federal (i.e. constitutional) question because:

1. There is a valid policy reason for the enactment of the Act.

2. The Act is similar to the marketable title statutes, statutes of limitation or recording acts.

3. The Act is "self-executing", therefore, questions of procedural due process do not arise.

Whether or not there is a valid policy reason for The Act does not affect its constitutionality. In *Sniadach v. Family Finance Corporation of Bayview* (1969) 395 U.S. 337, 23 L.Ed.2d 349, 89A S.Ct. 1820, the Court held that the question is not whether the law is wise, but whether it complies with the 14th Amendment.

There is no analogy to the marketable titles act, to statutes of limitation or the recording acts of the various states.

The purpose of the marketable title acts is to protect the record title holder against stale, spurious, conflicting or doubtful claims by others who are claiming the same interest. In the case of mineral interests there is no conflict with the surface owner. Each hold separate estates recognized under the law.

Here Appellee knew of the outstanding mineral rights, since they were specifically excepted in Appellee's deed. Further, Appellee knew of the whereabouts of Appellant. Despite this knowledge, The Act permitted a forfeiture of Appellant's interest.

The owner of the mineral interest and the owner of the surface interest are each entitled to the protection of the marketable title act. *These are titles in tandem, not titles in collision.*

We are not here dealing with murky titles or long-lost owners of interests. There is no cloud on the title of Appellant except as The Act creates the cloud.

In *Contos v. Herbst* (Minn 1979) 278 NW2d 732, the Minnesota Supreme Court distinguished the marketable title act from the dormant minerals act, holding the former constitutional, the latter unconstitutional.

Recording acts are intended to protect bona fide purchasers from unknown and unrecorded claims -- certainly no parallel to the case at bar since Appellee had full record knowledge of Appellant's mineral interests.

The attempted analogy to a statute of limitations is not applicable here. As was stated in *Contos v. Herbst*, supra, and *Wilson v. Bishop* (Ill 1980) 412 NE2d 522 (both cases set out in full in Appendix H and I of the Jurisdictional Statement), statutes of limitation are procedural in nature and are not designed to alter substantive rights or convey property interests. Here, the effect of The Act is to transfer property rights from one owner to another owner, without any attempt to comply with the Due Process Clause of the Constitution.

Appellee has not addressed any of the constitutional points raised by Appellant. Although Appellee says there is no substantial federal question, a simple reading of The Act immediately raises fundamental constitutional questions of due process and fair play.

Appellee says there is no federal question here because the statute is "self-executing" and therefore does not need to comply with the 14th Amendment. Obviously to say it is "self-executing" says nothing about the constitutional issue. Procedural or substantive due process is a constitutional requirement, with or without judicial proceedings, as shown by the decision of this Court in *Sniadich v. Family Finance Corporation of Bayview*, supra.

The Court should note probably jurisdiction of this appeal.

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No. 80-965

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TEXACO, INC.,
ROBERT BRASELTON,
ELECTRA FIELDS,
CHARLES BRASELTON,
CHESTER BRASELTON,
ROBERT E. BRASELTON,
CLIFFORD N. BRASELTON,
OSBORNE T. BRASELTON, JR.,
DAVID E. BURKHART,
JOHN P. BRASELTON,
ROSA G. BURKHART, and
D. W. MAYHEW, d/b/a Mayhew Oil and Gas Development - - - - - - Appellants

versus

LOUISE F. SHORT - - - - - - Appellee

STATE OF INDIANA - - - - - Intervenor

On Appeal from the Supreme Court of Indiana

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED FOR REVIEW

This is an appeal of the decision of the Supreme Court of Indiana in *Short* v. *Texaco*, ____ Ind. ____, 406 N. E. 2d 625 (1980), holding the Dormant Mineral Interests Act (also known as the Indiana Mineral Lapse Act) Indiana Code 32-5-11-1, *et seq.*, to be constitutional under both the United States and Indiana Constitutions, where the Act provides that a mineral interest severed from the surface ownership is deemed extinguished if use of the mineral interest is not made within 20 years or a statement of claim setting forth the ownership of the mineral interest is not filed in the county recorder's office.

1. Due Process.

Does the Dormant Mineral Interests Act of the State of Indiana violate the United States Constitution as to the 14th Amendment by depriving landowners of their property without due process of law, in that non-use of a mineral right for 20 years under the Act purports to extinguish the right without any notice or hearing?

2. Just Compensation.

Does the Dormant Mineral Interests Act of the State of Indiana violate the U.S. Constitution as to Section 1 of the 14th Amendment by the taking of private property without compensation to the person from whom the property has been taken when mineral rights are extinguished after 20 years of non-use, and such extinguished rights accrue to the owner of the surface?

3. Equal Protection.

Does the Dormant Mineral Interests Act of the State of Indiana violate the U.S. Constitution as to the 14th Amendment by denying certain persons of the equal protection of the law when it provides that the owners of 10

or more mineral interests in a county who inadvertently fail to file a statement of claim must be given written notice and a chance to file their claim prior to extinguishment of their interest when similar treatment is not afforded to those having less than 10 mineral interests?

4. Impairment of Contract.

Does the Dormant Mineral Interests Act of the State of Indiana violate the U.S. Constitution as to Article 1, Section 10, by unreasonably impairing the obligations of contracts in that it purports to terminate a contract right without consent or action of the parties?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case in this court. DeBeers Diamond Investment Ltd. was named a party below but a stipulation filed in the trial court shows they have no interest and are not a party before this Court. There is a companion (but not consolidated) case raising the same issues before this Court in No. 80-1018. This appeal attacks the constitutionality of the Indiana Dormant Mineral Interests Act on behalf of oil and gas interest holders. The companion case attacks the same Act on behalf of coal interest holders. The Supreme Court of Indiana made no distinction between the two interests, holding both to be vested property interests.

Reference is made to the Jurisdictional Statement for compliance with Rule 28.1 of the Rules of this Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-965

TEXACO, INC.,
ROBERT BRASELTON,
ELECTRA FIELDS,
CHARLES BRASELTON,
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DAVID E. BURKHART,
JOHN P. BRASELTON,
ROSA G. BURKHART, and
D. W. MAYHEW, d/b/a Mayhew Oil and Gas Development - - - - - *Appellants*

v.

LOUISE F. SHORT - - - - - - - - *Appellee*

STATE OF INDIANA - - - - - - *Intervenor*

ON APPEAL FROM THE SUPREME COURT OF INDIANA

BRIEF OF APPELLANTS

CITATIONS TO THE OPINION AND JUDGMENT DELIVERED IN THE COURTS BELOW

The opinion of the Supreme Court of Indiana, the Court below is cited as:

Short v. *Texaco*, ____ Ind. ____, 406 N. E. 2d 625 (1980).

The opinion was entered June 23, 1980, and is set forth in full at Page A-1 of the Appendix to the Jurisdictional Statement.

The Judgment of the trial court which was reversed by the Supreme Court of Indiana was entered September 18, 1978. It is set forth in full at Page A-14 of the Appendix to the Jurisdictional Statement. There is no other citation to the judgment.

GROUNDS OF JURISDICTION

This is a direct appeal from the decision of the Supreme Court of Indiana (the highest court of the State) holding the Indiana Dormant Mineral Interests Act (Indiana Code 32-5-11-1, *et seq.*) to be constitutional under the U.S. Constitution. Jurisdiction of this Court is founded on 28 U.S.C. §1257(2). Judgment was entered by the Gibson Circuit Court on September 18, 1978. The Indiana Supreme Court rendered its decision on June 23, 1980. A timely petition for rehearing was filed and it was denied by the Supreme Court of Indiana on September 24, 1980. Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Indiana on November 17, 1980. (Jurisdictional Statement, Appendix, Page A-28). This Court noted probable jurisdiction on March 23, 1981.

CONSTITUTIONAL PROVISIONS

Constitution of the United States of America:

> 14th Amendment, Section 1: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 10, Clause 1: No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

THE INDIANA STATUTE IN QUESTION

In 1971 the State of Indiana enacted the Indiana Dormant Mineral Interests Act (also known as the Indiana Mineral Lapse Act) (more properly known as the Indiana Mineral Interest Extinguishment Act) (hereafter sometimes referred to as the "Act"). The full text of the Act is as follows:

I. C. 32, Section 5
Chapter 11—Lapse of Mineral Interest

Section 1. Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five hereof, and the ownership shall revert to the then owner of the interest out of which it was carved.

Section 2. A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals.

Section 3. A mineral interest shall be deemed to be used when there are any minerals produced there-

under or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument.

Section 4. The statement of claim provided in section one above shall be filed by the owner of the mineral interest prior to the end of the 20 year period set forth in section two (one) or within two years after the effective date (September 2, 1971) of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the Recorder of Deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed.

Section 5. Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

(1) was at the time of the expiration of the period provided in section four, the owner of 10 or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of 10 years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

(3) failed to preserve such interest through inadvertence, and;

(4) filed the statement of claim herein required, within 60 days after publication of notice as provided in section seven herein, if such notice is published, and if no such notice is published, within 60 days after receiving actual knowledge that such mineral interest had lapsed.

Section 6. Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within 10 days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the Recorder of Deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given.

Section 7. Upon the filing of the statement of claim, provided for in section 4 of this chapter or the proof of service of notice as provided in section seven (six) of this chapter in the Recorder's office for the

county where such interest is located, the Recorder shall record the same in a book to be kept for that purpose, which shall be known as the "Dormant Mineral Interest Record" and shall indicate by marginal notation on the instrument creating the original mineral interest the filing of the statement of claim or affidavit of publication and service of notice.

Section 8. The provisions of this chapter may not be waived at any time prior to the expiration of the 20 year period provided in section 1.

STATEMENT OF THE CASE

The facts of this case are not relevant to a determination of the sole issue before this Court; namely, the constitutionality of the Indiana Dormant Mineral Interests Act. The issue of constitutionality was raised by affirmative answer at the trial court level and maintained throughout the proceeding.

The Appellee Short is the record owner of a 132 acre tract of land in Gibson County, State of Indiana, which she acquired by deed in 1974 (J.A. 21). Such deed specifically provided that it was subject to certain mineral deeds covering "oil, gas and other minerals." (J.A. 22) Such mineral deeds conveying all oil, gas and other minerals were created in 1942 and 1944 (J.A. 19-21) and were duly and promptly recorded in the Gibson County Recorder's office. The Appellants (with the exception of D. W. Mayhew d/b/a Mayhew Oil and Gas Development) are the successors in interest to such mineral interests. (J.A. 23) The Appellant, D. W. Mayhew d/b/a Mayhew Oil and Gas Development, is the lessee of oil and gas leases taken from the mineral interest holders in 1976 and 1977. (J.A. 24)

Thus, the record shows that Appellee is the surface owner of the 132 acre tract of land and except for the Indiana Dormant Mineral Interests Act, the Appellants are the mineral interest owners of such tract.

Thereafter, on April 28, 1977, the Appellee surface owner gave notice to Appellant mineral interest holders by publication in the Star Echo, a newspaper published at Owensville, Indiana, of a lapse of mineral interest. (J.A. 25). On May 6, 1977, the surface owner sent Notice of Lapse of Mineral Interest by United States Mail to the Appellants (except for the oil and gas lessee). (J.A. 26) Within 60 days (on June 17, 1977) Appellants filed statements of claim of mineral interest in the office of the Recorder of Gibson County, Indiana. (J.A. 26).

At no time were any of the Appellants the owners of 10 or more mineral interests in the County.

Thereafter, Appellee surface owner filed this action for declaratory judgment which was commenced in the Gibson Circuit Court of Gibson County, Indiana in 1977, against the Appellant mineral interest owners praying for a declaration that the rights of the mineral interest owners had lapsed and were extinguished by reason of the Indiana Dormant Mineral Interests Act, adopted in 1971. The complaint alleged that the mineral interests of the Appellants Texaco, et al., were not "used" within the meaning of the Indiana Dormant Mineral Interests Act for more than 20 years and no statement of claim was made under the Act. (J.A. 3)

Defendants filed answer raising the federal and state constitutionality issue (J.A. 11).

A stipulation of the parties agreed that Appellee Short's predecessor in title had granted oil and gas mineral deeds to Appellants' predecessors in title in 1942 and 1944 and

that Appellants Texaco, et al., had not used the mineral interests for 20 years and had not filed a statement of claim under the Act within two years following the enactment of the Act. (J.A. 18) Such stipulation did provide that Appellants did file statements of claim within 60 days of receiving Notice of Lapse of Mineral Interest. However, since none of the Appellants had 10 or more interests in the County, such filing would not prevent the extinguishment of their rights under the Act.

The judgment of the trial court held the Act to be unconstitutional under both the Indiana and U. S. Constitutions. (Jurisdictional Statement, Appendix B)

Upon appeal the Supreme Court of Indiana reversed holding the Act constitutional under both the Federal and State Constitutions. The opinion of the Supreme Court of Indiana is cited as 406 N.E. 2d 625. The opinion is set forth in full at Appendix A to the Jurisdictional Statement.

SUMMARY OF THE ARGUMENT

In 1971 the State of Indiana passed the Indiana Dormant Mineral Interests Act with the intent to reunite severed mineral interests with the ownership of the surface in cases where such mineral interests had not been used for 20 years or a statement of claim filed within that time (or within two years of the Act if the 20 year non-use has already expired). No notice was required to be given to the severed mineral interest owner before the Act extinguished his right, except for owners of 10 or more interests, in which event they were given a 60 day notice and an opportunity to file their statement of claim. Only in the event they failed to do so would their rights be extinguished.

It is Appellants' belief that the Indiana Act is unconstitutional.

Indiana has held mineral interests to be fee simple interests and vested property rights separate and distinct from the surface ownership. Such rights, in the language of the Indiana Supreme Court "are entitled beyond question to the firmest protection of the Constitution."

It is in the context of a vested property right that such Act violates four provisions of the United States Constitution.

1. *The Act Violates Procedural Due Process.* The Act extinguishes the mineral interests of the property owner without notice or opportunity for hearing as required by *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) and a whole series of cases thereafter. The Constitution requires that before a complete taking of a property right occurs that prior notice of such proposed taking must be given and an opportunity to be heard afforded. The true pernicious nature of the Act is found mainly in its retroactive effect. The mineral interest holders acquired their interests in 1942 and 1944 long prior to the passage of the Act. The Act comes along in 1971 and by 1973, their mineral rights had been extinguished though they had done nothing illegal and were not interfering with the rights of others. They could have saved their rights under the Act by filing a statement of claim within the two year period following the adoption of the Act had they known of the new requirement. The mineral interest holders were not lost, had not abandoned their interests and all responded to defend themselves once notice was given to them.

The procedural due process provisions were complied with as to the owners of 10 or more interests who were

afforded notice prior to the extinguishment of their interests. It violated due process in not affording similar rights to all mineral interest holders.

2. *The Act Violates the Just Compensation Provisions of the 5th and 14th Amendments.*

The Act extinguishes mineral interests retroactively for non-use within the 20 year period prior to the Act and two years following the Act. Such extinguished mineral interest is then reunited with the surface ownership. The net effect of the Act is to take fee simple ownership from the mineral interest holder and give it to the surface owner. Such taking and giving was made without notice and without compensation of any kind.

Assuming that there was a valid public purpose to be served by such taking, does that permit the taking without just compensation? The 1922 decision of *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922) holds that even though there is a valid public purpose, property can only be taken by payment of just compensation. In the years since *Mahon, id.*, the Court has refined what constitutes a "taking" but it is clear that where the entire bundle of rights comprising property ownership has been extinguished as a result of state action, that a taking has accrued requiring just compensation. That is particularly true where the property rights have been taken from one private person and given to another private person.

There is no analogy to the Marketable Title Acts, title recordation acts or statutes of limitation.

The mineral interest is a separate and distinct interest, independent of the surface ownership and of equal dignity. One is not a cloud on the title of the other. These are not

stale claims to be excised from the public record. These are titles in tandem not in collision, each of equal dignity before the law.

3. *The Act Violates the Equal Protection Clause.* The Act protects 10 or more interest holders by allowing them to record their statements of claim after having been given notice of lapse of interest, thus preventing extinguishment of their interest, whereas such right was not afforded all interest holders. Thus, only multi-interest holders are afforded procedural due process by prior notice—an invidious discrimination of a fundamental constitutional right.

4. *The Act Violates the Contract Clause by Extinguishing a Contract Right by State Action.*

The mineral interests held by Appellants are, in addition to being property rights, contract rights which under the Act are extinguished. Such rights are extinguished without notice and without compensation. Admittedly, under the police power, the states can impose reasonable restrictions and regulations on contract rights but they are precluded from completely abridging such rights, "even in the exercise of its otherwise legitimate police power." *Allied Structural Steel Company* v. *Spannaus,* 438 U. S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). Here the entire bundle of contract rights were extinguished in violation of the Contract Clause.

THE ARGUMENT

A. Introduction.

In 1971 the State of Indiana passed an act which has been referred to as the Indiana Dormant Mineral Interests Act or the Indiana Mineral Lapse Act. The Act was adopted to remedy a perceived problem in Indiana, that of severance of the surface ownership of real estate from the ownership of oil, gas, coal or other minerals lying beneath the surface (mineral rights) and the non-use of such mineral rights by the owners thereof.

The Act attempted to remedy the problem by providing that if such mineral rights are not used for 20 years and if the owners of the mineral rights failed to record in the Recorder's office of the County where located a "statement of claim" that such mineral rights were "extinguished" and ownership thereof vested in the surface owner. Such extinguishment of rights is automatic under the Act. There is no notice required or provided, no opportunity to be heard and no compensation for the taking of such rights. The Act was adopted to achieve the state's policy of re-uniting the previously severed mineral interests with the surface ownership. (See Indiana Supreme Court Opinion. Appendix A to Jurisdictional Statement.)

The Act had an exception in the case of a mineral owner who had 10 or more mineral interests in the county. As to such owner, if he met certain requirements, his mineral rights would only "lapse" and could be "extinguished" only upon the surface owner giving him notice and the mineral owner failing to file a "statement of claim" within 60 days following such notice.

The record shows that the Appellee surface owner before filing her complaint for Declaratory Judgment gave notice of lapse of mineral interest to Appellant mineral interest owners as provided by Section 6 of the Act. All Appellants within 60 days filed their statements of claim with the County Recorder in the manner provided by Statute. However, none of the Appellant mineral interest owners held 10 or more mineral interests in the county. Thus, even though they were vigilant in protecting their mineral interests after receiving notice, the Act extinguished their mineral rights.

The practical effect of the Act is not to clear titles of old stale claims but to put clouds on all mineral titles more than 20 years old—used or unused. No oil and gas operator is going to rely upon a lease from a surface owner relying on the Act for it is impossible to tell from the record whether the mineral interest has been "used" as defined by the Statute. Further it would be impossible to tell from the record if the mineral owner owned 10 or more mineral interests to come within the exception. The net effect of the Act is that it is only by court action to quiet title or declaratory judgment, with notice to all parties as required by law that the matter can be settled. Thus, the Act is not "self-executing" as the Appellee contends.

The trial court held the Act unconstitutional only to be reversed by the Supreme Court of Indiana. Similar acts were held unconstitutional under the 14th Amendment to the U.S. Constitution in Wisconsin, *Chicago & North Western Transportation Co.* v. *Pedersen,* 80 Wis. 2d 566, 259 N. W. 2d 316 (1977); in Illinois, *Wilson* v. *Bishop,* 82 Ill. 2d 364, 412 N. E. 2d 522 (1980); in Nebraska, *Wheelock* v. *Heath,* 201 Neb. 835, 272 N. W. 2d 768 (1978); and in Minnesota, *Contos* v. *Herbst,* ____ Minn. ____, 278 N. W.

2d 732 (1979). Michigan, on the other hand, has held a similar statute constitutional. *Bickel* v. *Fairchild,* 410 Mich. 21, 229 N. W. 2d 704 (1980).

It is important to note the retroactive effect of the Act. The Act was adopted in 1971. It purported to extinguish mineral interests created before the Act and for non-use before the Act. Appellants express no opinion as to the constitutionality if the Act were prospective only or applicable to mineral interests created after the passage of the Act.

The Act is before this Court to determine whether or not it satisfies the constitutional requirements of:

A. Procedural Due Process
B. Just Compensation
C. Equal Protection
D. Impairment of Contract

Essential to a decision in this case is a determination of the "rights" of Appellants Texaco, et al.

The rights of Appellants arise out of mineral deeds granted by the then surface owner in 1942 and 1944 (J.A. 19) granting to the Appellants and their predecessors in title fee ownership of oil, gas and other minerals in and under the real estate. This Court in *Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 569, 92 S. Ct. 2701, 2702, 33 L. Ed. 2d 548 (1972), stated:

> "Property interests are not created by the Constitution; rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

See also *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 98A S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

Following such dictates, we look to the law of Indiana for the creation of the right and the dimension thereof.

Indiana Code 32-5-7-3 provides:

> "Interests in the oil and gas in or on or under or that may be taken from beneath the surface of lands lying within this state may be created for life, for a term of years, or in fee, in such manner and to such extent as are all other interests in real estate; and title to such estates may be vested in one or more persons, by sole ownership, tenancy in common, joint tenancy, tenancy by the entireties, or in such other manner as may be now or hereinafter recognized in the law of this state. Such interests or estates shall be freely alienable, in whole or in part, in like manner as are other interests in real estate."

It is to be noted that under the Indiana law the fee ownership to oil and gas is a separate and distinct right separate and apart from but with equal dignity to the ownership of the surface. It is not a lesser right appurtenant to the surface ownership right. Such rights of subsurface ownership and surface ownership are not competing rights, neither has superiority over the other—neither is the superior right.

The Supreme Court of Indiana in its decision from which this appeal is being taken (*Short* v. *Texaco, supra*), held as a matter of Indiana law:

> "Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action.

> They are vested property interests, separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources." *Short* v. *Texaco, supra,* 406 N. E. 2d at page 627.

It is clear from the foregoing we are dealing with fee simple titles equal to but separate and distinct from the surface ownership. It is in that context the question of violation of constitutional rights must be answered.

B. Procedural Due Process. The Indiana Act Violates the 14th Amendment in That It Extinguishes a Property Right Without Notice or Opportunity for Hearing.

The Indiana Act provides that if a mineral interest is not "used" within a 20 year period the interest is extinguished unless the owner of the mineral interest files a "statement of claim" with the county recorder within the 20 year period (two years from the date of the Act, if the 20 years of non-use has already occurred). The effect of the Act is to extinguish rights solely based on non-use for 20 years regardless of whether or not the owner's whereabouts is known. Here the record shows substantially all of the mineral interest owners were known to the surface owner (as shown by the fact that notice by mail was given by the surface owner *after* the extinguishment) yet no notice was required or given *before* the extinguishment. Further, there is nothing in the record or required by the Act showing an emergency situation requiring summary action to justify the taking without notice.

The very nature of oil and gas or other hydrocarbons calls for long term use. Such hydrocarbons are produced from plants and animal material that existed millions of years ago. The formation of oil and gas takes millions of years and a happenstance of conditions: plant and animal life, water pressure, temperature, soils, porous limestone or sandstone covered by a layer of impervious rock and earth movement which traps the oil. Having taken a millennia to create, it seems a bit absurd to say that if the oil, gas or coal is not extracted within a 20 year period the mineral rights owner can have his interests extinguished by reason of such non-use. There may be numerious reasons why an owner may not develop or use such mineral interests within the period, reasons such as economics, technology and geology.

It should be further noted that one of the accepted ways of creating an interest in oil and gas or coal is by an oil and gas lease or coal lease. Such leases are of limited terms—one year for example, "and so long thereafter as oil and gas (coal) is produced from the premises". Such leases usually provide a royalty to the owner payable out of the production—such as ⅛th of all oil and gas.

The very nature of a mineral deed which is an interest in fee contemplates a different approach. There is no short term performance period. There is no royalty payable out of production. All of the payment is made at the front end and the owner of the mineral interest decides for himself when it is time to extract the minerals based on many factors. Hence the 20 year limitation is at variance with the expectations of the parties in the creation of such interests.

The leading case on the requirement of notice and opportunity for hearing is *Mullane* v. *Central Hanover Bank*

& Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). There, this Court dealt with the constitutionality of a New York law which required that for judicial settlement of trust accounts the trust company trustee was only required to publish notice in a newspaper of the filing of such account. No other notice was required to be given to the beneficiaries of the trust. In that case the court struck down the New York law, holding:

> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." *Mullane, supra,* 339 U. S. at page 319, 70 S. Ct. at page 660.

As a basis thereof this Court said:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane, supra,* 339 U. S. at page 313, 70 S. Ct. at page 656.

It is to be noted that in the very Act in question is "notice and opportunity for hearing appropriate to the nature of the case". For those fortunate to have 10 or more mineral interests the Act provides that their interest only "lapses" and is not "extinguished". To "extinguish" such "lapsed" interests the surface owner must give notice by publication and by mail, if the address can be obtained. Only if the mineral interest owner fails to file his statement of claim within 60 days thereafter is the mineral interest extinguished. Thus, what may be appropriate notice

is already provided for in the Act but unfortunately it is limited to the affluent having 10 or more interests.

In *Sniadach* v. *Family Finance Corporation of Bayview*, 395 U. S. 337, 89A S. Ct. 1820, 23 L. Ed. 2d 349 (1969), this Court was confronted with the Wisconsin garnishee law. There a creditor, prior to judgment could cause the defendant debtor's wages to be frozen without the opportunity to be heard. This Court struck down the law holding it violated procedural due process. The Court noted that it was making no judgment about whether the law was wise—the sole question is whether there has been a taking of property without that procedural due process required by the 14th Amendment. The Court concluded its opinion by saying:

> "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing. . . . this prejudgment garnishment procedure violates the fundamental principles of due process." *Sniadach*, id., 395 U. S. at page 342, 89A S. Ct. at page 1823.

It is submitted that the taking (read "extinguishment") of Appellants' fee mineral rights without notice and prior hearing is an obvious violation of due process.

Following the *Sniadach*, id., decision, this Court in 1972 handed down *Fuentes* v. *Shevin*, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). There the Florida and Pennsylvania prejudgment replevin statutes were held violative of the Due Process Clause for failure to have notice and opportunity for hearing prior to seizure of property. The Court, speaking through Mr. Justice Stewart, said:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair

process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to insure abstract fair play to the individual. Its purpose more particularly, is to protect his use and possession of property from arbitrary encroachment. . . . the prohibition— . . . . against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference. 407 U. S. at page 80, 92A S. Ct. at page 1994. See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 552, 92 S. Ct. 1113, 1122, 31 L. Ed. 2d 424 (1972)."

In the *Lynch* case, id., the Court said:

"The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."

Without the guarantee of due process as provided by our Constitution the right of private property cannot be said to exist. *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 33 S. Ct. 1033, 57 L. Ed. 1427 (1913).

In 1978, this Court decided *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1, 98A S. Ct. 1554, 56 L. Ed. 2d 30 (1978). The Memphis Light, Gas & Water Division of the City of Memphis terminated utility services of respondents without an opportunity for hearing. This Court

held that such action violated the Due Process Clause of the 14th Amendment. In doing so, it relied on *Matthews* v. *Eldridge*, 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) to "provide a framework of analysis for determining the specific dictates of due process" in this case.

In *Matthews*, id., the Court identified three distinct factors to be considered:

(1) The private interest that will be affected by the official action;

(2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and,

(3) The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Under the three preceding factors:

(1) The private interest affected is the complete extinguishment of a property right and the giving of same gratuitously to the surface owner.

(2) The risk of erroneous deprivation by failing to file a statement of interest is great. The cost of requiring notice of threatened extinguishment to the mineral interest holder before extinguishment and an opportunity to file the statement of interest is clearly insignificant in view of the risk of the erroneous deprivation of the rights of the mineral interest holders.

(3) Finally the government plays no part in the extinguishment except for the passage of the Act.

> No additional administrative burdens of consequence would be placed on government if the due process requirements were satisfied.

Thus, applying the three factors of *Matthews*, id., shows the need for due process, notice and hearing.

This Court in the 1979 decision of *Mackey* v. *Montryn*, 443 U. S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979), relied on the three factors set forth in *Matthews* v. *Eldridge*, *supra*, to determine that the Massachusetts statute mandating suspension of driver's license for refusing to submit to breath analysis was valid. In a 5-4 decision the Court held due process was not violated. In so doing it balanced the public and private interests pointing out that the public interest is substantially served by the summary suspension of license. It is submitted that no such public interest is present here to justify an extinguishment of right without notice or hearing.

The Act does not require anyone to "use" his mineral interests. All it requires is that one either "use" or rerecord. The only purpose served by the rerecording is that the owner be locatable so if someone wants to "use", i.e. develop the minerals, such person can find the true owner by looking in the book. The statute provides no guarantee that development will result. Even with the extinguishment and the gift to the surface owner there are no assurances of development. Thus, the only effect of the Act is to determine the whereabouts of the persons who own the mineral interests and place same of record. That being so, the purpose of the Act is satisfied if the true owner of the minerals is notified and given an opportunity to protect his interest by filing his statement of claim. If he then fails to respond due process has been

satisfied and a forfeiture may ensue, thus satisfying the objective of the Act, i.e. to have the whereabouts of the interest holder known, since at that time the mineral interest owner would be the surface owner.

It is submitted that the taking here is automatic, complete and absolute without any requirement of notice of any kind, thus violating the rules as laid down in *Sniadach* v. *Family Finance Corporation of Bayview*, 395 U. S. 337, 89A S. Ct. 1820, 23 L. Ed. 2d 349 (1969).

The effect of the Act is to take the mineral owner's property because he did not use it for 20 years and did not rerecord his interest within the 20 year period. No notice was given of the lack of rerecording before the forfeiture occurred. At the very least such notice should be required before the application of the draconian remedy of extinguishment.

Appellee has argued that everyone is presumed to know the law and therefore the mineral interest holders are presumed to know of the 20 year requirement of use and of the two year grace period for filing a statement of claim, thus the notice requirement of due process is satisfied. In Indiana there is no "publication" of the statutes adopted except by the yearly printing and distribution of the Acts for each legislative session to the various county clerks. Indiana Code 2-6-1.5-5. Suffice it to say that if this Court would not approve the notice by publication in a newspaper in *Mullane, supra,* because it was "not reasonably calculated to reach those who could easily be informed by other means at hand" such notice of the adoption of the Act would not satisfy the due process requirement.

The Act violates the 14th Amendment in that it extinguishes a substantial property right, i.e. a fee simple title, without notice or opportunity for hearing.

C. Just Compensation. The Act Violates Section 1 of the 14th Amendment By the Taking of Private Property From One Property Owner and Giving to Another Property Owner Without Any Compensation.

Section 1 of The Act provides:

> "Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished unless a statement of claim is filed in accordance with section five hereof, and the ownership shall revert to the then owner of the interest out of which it was carved."

The Act was adopted in 1971. Appellants acquired their interests many years prior to the Act. The Act further provided, in Section 3, that where the 20 year period had expired at the time of the adoption of the Act, that a statement of claim had to be filed within two years of the effective date of the Act.

The net effect of the Act was to take unused oil, gas and coal properties from the owners of such mineral interests and give them to the owners of the surface. Such taking and giving was accomplished without notice and without compensation in any form.

It is not sufficient to say that Appellants could have protected themselves by filing a statement of claim within the two year period—admittedly a simple act—because no notice was given to them as to what was expected of them. The Act similarly provides no opportunity for the mineral interest owners to appear in any forum to declare and protect their interests or to show that, had they known of the filing requirements, they would have met them.

The Indiana Supreme Court in its opinion upholding the Act stated what it believes to be its purpose. The Court said:

> "The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use."

Thus, it is clear the purpose of the Act is not to find and put on record the names and addresses of mineral interests holders but to *extinguish* all mineral interests not used within the 20 year period. This is not regulation but extinction! This is not fine and imprisonment for non-use but capital punishment. Knowing the objective to *extinguish* the property right it is perfectly understandable why there was no notice and opportunity for hearing provided in the Act. Such notice would have interfered with the State's purpose to reunite mineral rights with surface rights.

Indiana has a right to make its own public policy so long as consistent with the United States Constitution. This Court does not sit as a superlegislative body to weigh

the wisdom of legislation nor to decide whether the policy which it expressed offends the public welfare so long as specific constitutional prohibitions are not violated. *Sniadach* v. *Family Finance Corp. of Bayview, supra; Day-Brite Lighting* v. *State of Missouri,* 342 U. S. 421, 72 S. Ct. 405 (1952).

Assuming for the moment a valid public purpose would be served, does that make valid a taking from one property owner and a giving to another? It should be noted that every condemnation proceeding must have a valid public purpose as a prerequisite to a taking with compensation. See *Pennsylvania Coal Company* v. *Mahon, Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, 415, 43 S. Ct. 158, 159, 67 L. Ed. 322 (1922) where it is said:

> "The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th Amendment."

Having a valid public purpose is therefore only the start of this inquiry, since the means to achieve such public purpose must be tested against the constitutional requirements.

We are not dealing here with the regulation of property or the *taking of* "one strand" from the "full bundle of property rights" as in *Andrus* v. *Allard,* 444 U. S. 51, 61, 100 S. Ct. 318, 327 (1979). Here we are dealing with a taking of the "full bundle of property rights," with Appellants left with nothing. The taking has been clean, painless, antiseptic. Property rights are "extinguished" without the bother or trouble of notice, of courts or of hearings, or of having to pay from the public treasury for the taking

of such property rights. That may be the way some countries run their business, but so long as we have a Constitution, it is not our way.

In *Kaiser Aetna* v. *United States*, 444 U. S. 164, 100 S. Ct. 383 (1979), the United States attempted to allow public access onto private property on the theory that such private property had become navigable waters as a result of the actions of the property owners. There, the Court distinguished between mere regulation (as in *Andrus* v. *Allard, supra*) and an actual taking (as in *United States, ex rel TVA* v. *Powelson*, 319 U. S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 [1943]). In *Kaiser Aetna, supra*, this Court speaking through Mr. Justice Rehnquist, held that giving public access to private lands was a "taking" which could not be effectuated without just compensation.

The case of *Pennsylvania Coal Company* v. *Mahon, supra*, (cited by this Court in *Penn Central Transportation Company* v. *New York City*, 438 U. S. 104, 98A S. Ct. 2646, 57 L. Ed. 2d 631 [1978] as the "leading case" in this area) is relevant to the issue of "taking." There a Pennsylvania statute prohibited the mining by a mineral owner under property of a surface owner, if such mining would cause a subsidence of the surface. In the opinion of the Court, written by Mr. Justice Holmes, it was stated that the statute admittedly destroyed existing rights of property and contract. The question is whether the police power can be stretched to permit such destruction of right. The Court said:

> "One fact for consideration in determining such limits [of police power] is the extent of the diminution. When it reaches a certain magnitude, in most if

not in all cases there must be an exercise of eminent domain and compensation to sustain the act. . . . ." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at page 413

". . . the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate,—. . . ." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at page 414

"We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Pennsylvania Coal Company* v. *Mahon, supra,* 260 U. S. at page 416

Here the effect of the Indiana Act is to take the entire fee simple title to the mineral rights and give them to the surface owner, thus giving to the surface owner "greater rights than they bought." As was held in *Mahon, supra*: there may be a valid public purpose even one sufficient to invoke the power of eminent domain, but the state cannot take the property right without just compensation.

In *Penn Central Transportation Company* v. *City of New York, supra,* the Court rejected claims of the property owners and determined there had not been a "taking" under the New York historic landmark preservation law. The Court noted that whether a particular government restriction amounts to a taking depends largely upon the particular circumstances in each case. One of the factors hav-

ing particular significance, the Court noted was "The economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment backed expectations."

Here, the Indiana Act destroys a property right created solely for the pursuit of "investment backed expectations."

The second factor in the *Penn Central* case is whether the regulation interfered with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for 5th Amendment purposes. Here the State of Indiana has determined as a matter of state law, that Appellant mineral interest owners had a "property interest" entitled to constitutional protection. *Short* v. *Texaco, supra.* By the extinguishment of such property interests there was a complete and absolute "interference" as referred to in the *Penn Central* case.[1]

The conclusion from *Pennsylvania Coal, Kaiser Aetna, Penn Central, Anderson* and others that condemn regulations that rise to the level of a taking apply a fortiori here. In the regulation cases the owner is still left with title, albeit restrictions on use. In this case, title and the full bundle of rights constituting ownership were taken and extinguished.

It should be noted that in the normal "taking" case the beneficiary was the public acting through government. Here there was a public taking of a private property interest and the giving of the benefits of such "taking" to a private party, i.e. the surface owner. Such action makes it

[1]The Indiana decision presents a complete dichotomy. On the one hand it recognizes that mineral interests are property rights, "entitled to the firmest protection of the Constitution." On the other it permits its extinction without notice and without just compensation.

no less a taking. (See *Pennsylvania Coal Co.* v. *Mahon, supra*). If anything it would appear to exacerbate the taking.

Appellee has attempted to justify the Indiana Act on the basis that it is "analogous to acts of limitation which vests title to real and personal property." It is submitted there is no analogy. Statutes of Limitation are devices to protect the integrity of the judicial process by excising stale claims. The policy of the law is to require a claim to be timely pursued before evidence has disappeared and memories faded. *Chase Securities Corporation* v. *Donaldson*, 325 U. S. 304, 65 S. Ct. 1137, 89 L. Ed. 1628 (1945). The Court in *Chase* went on to say that though the 14th Amendment does not make an act void merely because it has some retroactive application "what it does forbid is taking of life, liberty or property without due process of law."

There is a fundamental difference between statutes of limitation and the Indiana Act. Statutes of limitation deal with stale claims and interpose a procedural bar to asserting such claim in court. The Indiana Act, however, is substantive. It does not purport to deal with claims but extinguishes property ownership in one and vests it in another. There is no analogy with statutes of limitation.

It is to be noted that Section 8 of the Act provides there can be no waiver of the use requirements. Such a provision is inconsistent with the Act being in the nature of a statute of limitations since waiver is a defense to limitation statutes. *Allen* v. *Smith*, 129 U. S. 465, 9 S. Ct. 338, 32 L. Ed. 732, 51 Am. Jur. 2d 894 (Limitation of Actions §422).

The Indiana Act is not similar to the Marketable Title Acts or other title recordation statutes. Marketable Title

Acts and recordation acts are designed to deal with conflicting claims of title to the same property. Here we are not dealing with the same property. Indiana Code 32-5-7-3 (see page 15 above) vests a mineral interest with the same standing or dignity as the surface interest. Each can be fee simple title. Each is independent of the other. Neither is appurtenant to the other. Thus, these are titles in tandem not titles in collision, such as is dealt with in the Marketable Title Acts.

Marketable Title Acts provide that if one has clear record title for a long period of time any claims or interests which are inconsistent therewith arising prior to the stated period are extinguished unless such claim is recorded. Thus, the legislation removes ancient or purely technical impediments to title in favor of a clear record title holder which is essentially a sorting out of competing claims. Here there are no competing claims, except as the legislature has created same.

The Supreme Court of Minnesota in *Contos* v. *Herbst*, ____ Minn. ____, 278 N. W. 2d 732 (1979), dealing with a statute similar to the Indiana Act which it held unconstitutional discussed both the Marketable Titles Act and the statute of limitations analogy. In both instances it held such acts were not analogous. See also the opinion of the Illinois Supreme Court in *Wilson* v. *Bishop*, 82 Ill. 2d 364, 412 N. E. 2d 522 (1980) Both such cases are set out in full as Appendix H and I to the Jurisdictional Statement.

There is no analogy to the Marketable Title Acts or the Recording Acts.

D. Equal Protection. The Indiana Act Violates the Equal Protection Clause of the 14th Amendment By Giving Special Privileges to Mineral Interest Owners Having 10 or More Mineral Interests Not Granted to Lesser Interests, Thus Treating Persons of the Same Class Differently.

Section 5 of the Act provides that failure to file a statement of claim shall not cause a mineral interest to be extinguished if the owner of 10 or more interests failed to do so by inadvertence after having filed a statement of claim as to other mineral interests. As to such multi-interest holders, their claim shall be extinguished only if they fail to file their statement of claim within 60 days after having been notified by publication and by mail of the fact that their mineral interest had lapsed.

The net effect of Section 5 of the Act is to afford multi-interest holders a form of procedural due process not afforded to those having lesser interests.

It is submitted that the Act makes an "invidious discrimination" and an "arbitrary classification." The Act treats persons of the same class differently in violation of the equal protection clause. *Ohio* v. *Dollison,* 194 U. S. 447, 48 L. Ed. 1062 (1904).

Procedural due process is a right afforded to all under the Constitution. Presumably those with the greater number of interests would be more sophisticated and more knowledgeable, yet they are given the privilege of inadvertence and requirement that they be personally notified before their lapsed rights can be extinguished.

Since the issue is not in the area of "suspect classifications" but in the economic area, we realize the level of scrutiny is low. *U. S. Railroad Retirement Board* v. *Fritz,*

___ U. S. ___, 101 S. Ct. 453, 459; 66 L. Ed. 2d 368 (1980). This case is different, however, in that the Act grants the constitutional protection of procedural due process to a certain class (10 and over) and withholds such protection from all other folks. Such invidious discrimination on an important constitutional right is one not to be tolerated.

If the purpose of the Act is to identify on the record the current owners of the mineral interests then the purpose of the Act is best served by giving prior notice to all mineral owners along with the opportunity to protect their rights by filing the statement of claim.

The invidious discrimination is of a fundamental constitutional right.

E. Impairment of Contract. The Act Violates the Contract Clause By Extinguishing a Contract Right Without the Consent or Action of the Parties.

The rights of Appellant mineral owners arise out of a deed of conveyance from the owner of the fee. Such mineral rights arise out of contract. Under the Act the rights granted by such mineral deed are not only impaired, they are extinguished by reason of state action. Therefore, the Act violates the Contract Clause of Article 1, Section 10 of the U. S. Constitution.

The two most recent cases of this Court upholding the Contract Clause are:

United States Trust Company of New York v. *New Jersey*, 431 U. S. 1, 97A S. Ct. 1505, 52 L. Ed. 2d 92 (1977) and *Allied Structural Steel Company* v. *Spannaus*, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978).

In the *U. S. Trust Company* case, *supra*, the Court held unconstitutional a retroactive repeal of a 1962 covenant

dealing with subsidizing of rail passenger transportation. Such repeal impaired the rights of bond holders who relied on the covenant as part of their security.

In *Spannaus, supra,* the Court held a Minnesota statute requiring an employer under existing employee pension plans to pay a pension funding charge if the pension plan was thereafter terminated or the employer closed a Minnesota office. In opinions by Mr. Justice Blackman and Mr. Justice Powell, respectively, the police power of the states was recognized in the area of contract impairment. In the *U. S. Trust* case, *supra,* the Court said:

> "Similarly, a state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." 431 U. S. at page 31, 97 S. Ct. at page 1552.

Here, if the State had required notice to be given to the mineral interest holder prior to the forfeiture with an opportunity to file a statement of claim within a reasonable time after such notice, such requirement would have been the more moderate course and would have served the state's purpose of making the mineral interest owners known equally well.

In the *Spannaus* case, *supra,* the Court said:

> "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractural relationships, even in the exercise of its otherwise legitimate police power."
>
> "In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractural relationship. The severity of the impair-

ment measures the height of the hurdle the state legislation must clear." *Allied Structural Steel Company* v. *Spannaus*, 438 U. S. at page 242, 92A S. Ct. at page 2721.

Again the Court talked about the expectations of the parties in their contract dealings and whether the state action frustrated such expectations. Here the Appellants had fee simple title to the minerals—the greatest bundle of rights one could have in property. A fee simple title is not a terminable interest or one limited by time. The Act essentially changed the nature of the property interest to one limited in time and with burdens imposed that were not part of the original contract of conveyance. Further, the net effect of the Act was to forfeit the contract rights. When judged by the severity of impairment in the case—the State cannot clear the hurdle.

The Supreme Court of Nebraska in *Wheelock* v. *Heath*, 201 Neb. 835, 272 N. W. 2d 768 (1978), held a Nebraska statute similar to the Indiana Act unconstitutional under both the Due Process and Contract Clauses of the U.S. Constitution.

CONCLUSION

To the extent that Indiana attempted by the Act to extinguish old, abandoned and forgotten mineral interests and to restore such ownership to the owner of the surface, it probably served a valid public purpose. Unfortunately, the Act was cast in a form much broader than that for it applied equally to the known mineral owner who may have very valid reasons for not using such minerals within the 20 year period. Further, the Act had a retroactive effect. For those who did not use their mineral interests in the

20 year period preceding the Act, they were granted a grace period of only two years.

In every case cited in this brief the extent of the harm inflicted by the state statutes on private interests was less than the harm imposed here. Here there was no impairment of rights but a complete extinguishment. Here there was no notice of any kind before the taking.

Had the legislation provided notice to all mineral interest holders with the opportunity to file a statement of claim after notice in the form and manner set forth in Section 5 of the Act, the requirements of procedural due process would probably have been satisfied. It would have eliminated the equal protection issue and could be justified as a reasonable regulation affecting contracts. Any person not responding to the notice by filing a statement of claim would be deemed to have abandoned the property interest. At that point the doctrine of escheat could apply, vesting title in the state or possibly a theory of abandonment which would justify vesting title to the abandoned property in the surface owner.

Another method of attacking the problem is to impose an ad valorum tax on the mineral interest and if the tax is not paid the interest could be sold at tax sale.

The point is that there are constitutional ways to achieve the result of cleaning up old abandoned mineral interests. The Indiana Act fails four constitutional tests in the manner in which it tried to attack the problem.

The Act should be held unconstitutional as violating the 14th Amendment and Article 1, Section 10 of the U.S. Constitution and the decision of the Supreme Court of Indiana should be reversed.

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Nos. 80-965, 80-1018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-965

TEXACO, INC., et al., ... Appellants

versus

LOUISE F. SHORT, ... Appellee
STATE OF INDIANA, ... Intervenor

No. 80-1018

EDEN H. POND, et al., ... Appellants

versus

ULYSSES G. WALDEN, JR., et ux, . . . Appellees
LOUISE F. SHORT, ... Intervenor

Appeals from the Supreme Court of Indiana

JOINT BRIEF OF APPELLEES, LOUISE F. SHORT, INTERVENOR, AND STATE OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Can the State, in the exercise of its police power, require the claimant of an untaxed, undeveloped and otherwise dormant mineral right to register his claim in a local county recorder's office once each twenty (20) years on penalty of forfeiture, without also providing a means or process calculated to give such claimant actual notice of the registration requirement?

2. Can the registration requirement be imposed retroactively by providing, in lieu of actual notice of the law to claimants, a two-year grace period for filing claims after the effective date of the law?

3. Can the state, without denying equal protection, provide a means whereby the owner of ten (10) or more such interests in the same County who has filed timely claims on other interests in said County, but fails to file on a particular interest through inadvertence, may nevertheless preserve such interest by a prompt filing after receiving actual notice of such failure to record a claim as to that particular interest?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Nos. 80-965, 80-1018

No. 80-965

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW d/b/a MAYHEW OIL AND GAS DEVELOPMENT, - - - - - - - - - *Appellants*

v.

LOUISE F. SHORT, - - - - - - - - *Appellee*
STATE OF INDIANA, - - - - - - *Intervenor*

No. 80-1018

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY - - - *Appellants*

v.

ULYSSES G. WALDEN, JR.,
CAROLYN SALLEE WALDEN, - - - - - *Appellees*
LOUISE F. SHORT, - - - - - - - *Intervenor*

APPEALS FROM THE SUPREME COURT OF INDIANA

JOINT BRIEF OF APPELLEES, LOUISE F. SHORT, INTERVENOR, AND STATE OF INDIANA

STATEMENT OF THE CASE

Appellees SHORT and WALDEN are sometimes referred to in this brief for convenience as the "landowners", and Appellants are similarly referred to as the "mineral claimants". The landowners acquiesce in the mineral claimants' statement of the case with the following exceptions:

(a) The mineral claimants in *Texaco* made a delayed recording of their claim within sixty (60) days after receiving actual notice of extinguishment. It is true, as indicated by Texaco's brief, that under the stipulation the mineral claimants in that case did not own ten (10) or more interests in the County. The stipulation does not show, however, that these claimants made any effort whatever to preserve their unused interests, or file other statements of claim, or that the failure was due to inadvertence as that term is used in the statute. Thus, contrary to Texaco's contention, the Court could not and did not find that Texaco's failure to bring itself within the requirements of the "ten interest exception" was due solely to the fact that it owned fewer than ten interests.

(b) Unlike the Texaco claimants, the mineral claimants in *Pond* did not record notices of claim at any time prior to commencement of the current litigation.

(c) The mineral claimants elected, in both cases, to test the constitutionality of the Act without tendering any evidence concerning the general nature and effect of the problem and the effect of the legislative remedy. Accordingly, the constitutional issue must be tested under any state of facts which may reasonably be assumed to exist.

SUMMARY OF THE ARGUMENT

State court decisions in several mineral-producing states have permitted unused, severed mineral rights, unlike any other class of property, to become virtually immune from loss, abandonment, tax sale or termination in any other manner. This immunity, coupled with economic factors, geologic uncertainties, and changing extraction technologies has substantially hindered both the development of the minerals and of the land for other purposes. The State has addressed the problem through its Dormant Mineral Act. This act, although perhaps not the only or even best solution, is nevertheless reasonably related to a legitimate legislative objective, i.e., restoring the integrity of land by (1) extinguishing abandoned mineral claims, and (2) making public the names and addresses of the owners of such claims as are not abandoned. Accordingly, the Act satisfies the requirement of substantive due process.

Like most regulatory legislation in the realm of property law and choses in action, the Act is self-executing, retroactive, and generally unforgiving. Also, like most similar legislation, it provides a reasonable grace period and simple procedure for those potentially affected by its provisions to exercise or preserve their existing prerogatives. So long as the grace period is reasonable, retroactivity does not offend due process and the procedural safeguards of notice and hearing need not be incorporated in the Act. The grace period concept is firmly rooted in precedent and is a valuable and necessary alternative to actual notice where legislation affects the vested rights of persons widely scattered and not readily identifiable.

Properly interpreted, Section 5 of the Act permitting an owner of ten (10) or more claims in the same County the opportunity to correct inadvertent filing errors, is not

unlawfully discriminatory. This section recognizes that certain owners of large numbers of long term claims, particularly in coal, would likely, while attempting to comply with the Act, make clerical errors of identification and perhaps even omission in their filings. The intent of the legislature was that such errors not be prejudicial to the claimant. The choice of ten (10) interests as the point at which such errors are likely to occur even when due diligence is exercised was, as opposed to any other number, a legislative judgment. In the local economic sphere, such judgments need only be rationally related to a legitimate classification. Mathematical exactitude is not required.

Extinguishment of a property or contract right in the legitimate exercise of the police power is not equivalent to a governmental taking when simple provision is made and time given for affected persons to avoid the forfeiture. In this case, the twenty-year initial term of the interest, the two-year grace period, and the simple refiling procedure for preservation saves the Act from 'condemnation' as a legislative taking without compensation.

In matters concerning property rights, (enforceable against the world), as opposed to contract rights, (enforceable only between contracting parties and their privies), the constitutional standard for contract impairment is substantive due process. Thus, if the legislature approaches a legitimate legislative concern in a rational way, the incidental limitations on private contract rights must give way to the public interest.

ARGUMENT

I. INTRODUCTION

Absolute acceptance by the Courts of mineral producing States (save only Louisiana and California) of the

notion that severance of and commerce in speculative mineral rights somehow promotes the industry has resulted in a concept of a mineral estate which is both unique, and, in some respects, fictional. An unused mineral right is the only "property" in our entire legal system with all of the following attributes:

1) It cannot be abandoned.
2) It cannot be lost to an adverse possessor.
3) It may be held in perpetuity without use or development and is an estate of inheritance.
4) The estate may exist even though there is or may, in fact, be no res, (e.g., no oil, gas or coal) for the property rights to attach to or the quantity or quality thereof may be such that the res has no economic value.
5) The property right exists even though the owner thereof knows not whether the res has value or even exists.
6) The estate continues to exist even after the mineral has been extracted.

These attributes, together with historical factors related to economics and technology, have created a serious land problem. The legislatures of Indiana and many other States have attempted to resolve this problem in a direct, expeditious and fair-minded manner through Dormant Mineral Acts.[1]

---

[1]The nature and extent of the problem is different in different States and geographical areas and may well call for different resolutions. For example, in Pennsylvania and Virginia, the coal industry developed prior to 1800 and oil by 1860—times when public record keeping was non-existent or, at best, unreliable. In Indiana,

(Footnote continued on next page)

Counsel, in *Pond*, argues that severed mineral rights should escheat to the State or that forfeiture should be preceded by "a simple administrative or judicial proceeding" instituted by someone other than the mineral claimant. The first contention is contrary to our entire history of public policy toward land titles. We do not transfer stale land claims to the State—we simply extinguish them. See, e.g. 43 U.S.C.S. § 1744; also, *Jackson* v. *Lamphire* (1830) 28 U. S. 280. The Indiana Supreme Court recognized this policy in the cases at bar in the following language:

(Footnote continued from preceding page)
Illinois and Michigan, the industries developed between 1830 and 1900, and in the more Western States between 1920 to 1950. In the latter States, record keeping is somewhat better, but varies widely on a local basis, and, of course, fewer generations of successive owners have become involved. Similarly, some States, such as Indiana, have only a few counties involved in mineral production and contribute only small percentages of the total national output while others, such as Texas (oil) and Kentucky (coal), contribute major shares. Likewise, the extent of proved reserves in geographic areas involved varies widely from State to State. Of total U. S. proved oil reserves, more than one-fourth is in Texas while about 6/100 of 1% is in Indiana. See *U. S. Crude Oil and Natural Gas Reserves, 1977 Annual Report*, Energy Information Administration, Office of the Oil and Gas Information Service, U.S.D.O.E. Washington DC, February 1980; also, *Coal Data Book*, President's Commission on Coal, Washington DC, February 1980; also, Schmidt, Richard A., *Coal in America; An Encyclopedia of Reserves, Production and Use.* 1979 McGraw-Hill, Inc., West Point PA.

Of the twenty-five States with significant coal reserves, eight have adopted Dormant Mineral Acts and of twenty-four with oil and gas reserves, six have adopted such Acts. The first was enacted in 1893 in Pennsylvania, but eleven of the current fourteen statutes were enacted in the last twenty years. It may be anticipated that the need for such enactments will increase and would have done so even in the absence of the current energy crisis.

> "The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner."

Jurisdictional Statement, *Texaco, Inc., et al.* v. *Short, et al.*, page A-2. Of all the state statutes heretofore adopted, only one—the Minnesota Act—utilizes the concept of escheat or reversion to the state. Minn. Stat. § 93.52-58 (1978); see generally, Outerbridge, *Missing and Unknown Mineral Owners*, 25 Rocky Mountain Mineral Law Institute Proceedings, 20-1 (1979).

The response to the second contention is that the simplest of administrative proceedings can become exceedingly complex, and always involve considerable expense. To put on the landowner the burden and expense of inviting dormant mineral claimants to preserve their interests would defeat the purpose of the Act. The landowner would obviously have no inducement to do so except in those cases where extensive research and investigation might establish in advance that notice would be unlikely to reach the claimant. On the other hand, the State is not equipped for such an undertaking, and, likewise, has no duty to mineral claimants. Thus, we find a grace period concept introduced as a practical, necessary substitute for notice.

Characterization as a fee simple estate does not inhance the nature of a non-productive, severed mineral right, and does not create any constitutional context entitling such a right to protection or preservation, which it would not otherwise have. Nor is "equal dignity" a test of constitu-

tionality in the property sphere. In any event, it is evident that in Indiana such mineral rights prior to the Act enjoyed greater dignity than any other property concept known to man, save only sovereignty itself. See generally, Outerbridge, *Missing and Unknown Mineral Owners,* 25 Rocky Mountain Mineral Law Institute Proceedings, 20-1 at 20-7 (1979).

Often, when a non-productive mineral right is severed in fee, neither party to the transaction knows whether it is worthless, or of some value, or extremely valuable, the odds being greatly in favor of no or little value. This state of facts often remains until some stranger to the transaction at some unknown, unpredictable time expends a great deal of effort and expense to measure, explore, develop and, perhaps, operate the property. Further, the value of the right is extremely volatile. The huge coal deposits of Montana and Wyoming, for example, remained worthless for generations because of transportation costs. Eastern and Midwestern deep coal deposits were heavily produced in the early history of our country and then sold for taxes by the millions of acres in the 1930's and 1940's when oil and gas became cheap and plentiful. Similarly, oil strata capable of stripper production (the type found predominately in Indiana) have been subject to wide swings in value and development.

The severed and fractional interests we here deal with cannot fairly be described as the valuable properties with investor expectations which Pond and Texaco argue so eloquently in favor of. Lacking a record, the landowners submit the following speculations as more nearly comporting with reality in the present cases.

Texaco and other major oil companies by the late 1930's and early 40's learned to find "geologic highs"

through seismic operations in the Illinois basin and elsewhere, and also learned that such highs stood better chances of producing oil and gas than other areas. Times were hard for farmers and a share of their oil rights could be purchased often for a pittance. Farmers knew nothing of geologic highs. Texaco, on the other hand, had no plans to drill or it would have purchased or leased all of the oil rights, not just a fraction. Texaco simply wanted to speculate—to be in on the action if some independent producer made a discovery in the area sometime in the future. To the speculator, the cost was nominal; there was no duty to develop, no property taxes and a fee simple estate forever which could not be lost—a good way for Texaco to use its secret knowledge but hardly a valuable economic contribution worthy of preservation under the guise of a fundamental right.

Pond, on the other hand, reserved her mineral rights when she sold the family farm. At that time, there was only one active deep coal mine in the State of Indiana and stripper oil production, although known in the County, was generally not very profitable to operator or landowner and drilling was on the decline. The value of the mineral estate was extremely speculative—so speculative, in fact, that the farm would bring probably as much on the market without the mineral rights as with them. Again, Pond could reserve and retain the mineral estate indefinitely, at no cost even for taxes, and with no duty to develop—so why not—a natural speculation; but, again, hardly desirable or useful from a public viewpoint.

In short, technical theories of legal estates, tandem titles and investment expectations do not describe the real world in this situation. Reality, in the worst cases, is a hopeless tangle of vague, indefinite and inaccurate quit-

claim mineral deeds interspersed with a generous helping of unsettled estates, estates settled without reference to the mineral deeds, missing persons, missing heirs, defunct corporations and almost no claimant who knows what interest, if any, he owns. At its best, reality is a surface-part mineral owner at odds with the severed mineral owner and developer over the use of surface and surface damage without compensation—in itself a substantial hindrance to mineral development; or a banker unwilling to take a home mortgage from the surface owner.

II. THE ACT SATISFIES ALL REQUIREMENTS OF DUE PROCESS

A. The Act Is Consistent With Substantive Due Process

The mineral claimants, in their briefs, have avoided addressing the issue of substantive due process, but have, instead, attacked the retroactive provision of the Act as procedurally deficient and § 5 (the ten interest exception) as discriminatory.[2] The landowners contend, and the Indiana Supreme Court held (see Texaco's Jurisdictional Statement, page A-10), that the Act should properly be tested as a whole by the standards of substantive due process. The agreed facts in both cases show that the claimants' mineral rights were extinguished solely because claimants failed to make any use of them for twenty (20) years, and, also, failed to file a document with the recorder of deeds within two (2) years after the effective date of the Act. The facts of both cases further show that the §5

[2]Texaco does assert, at page 17 of its brief, under the banner of procedural due process, that it is irrational to require extraction in twenty years of a resource which it took a millennia to create. Appellees perceive no easy response to this chilling argument and elect not to address it.

exception was unavailable to the claimants not only because they owned fewer than ten (10) interests, but also because (1) they made no effort whatever to preserve their unused interests within the two (2) year period; and (2) failure to preserve the interests in question did not result from any claimed inadvertence.[3]

The Act was adopted to facilitate development of Indiana's mineral resources by eliminating interests created during periods of previous development going back to the last century. The owners of such interests frequently depart the area when the boom which prompted the creation of their interests subsides. When an attempt is made to develop such interests today, it is frequently impossible to locate many of the departed mineral owners. In fact, the owners themselves, after a generation or two, become unaware of the existence of the interests. Since title to the minerals is generally not subject to loss by abandonment, a definite need for a legislative remedy exists. (See Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles*, 7 Land and Water Law Review, 73 (1972).

At one time this Court was more inclined to use the due process concept to strike down economic legislation than presently. An example is *Lochner* v. *New York* (1904), 198 U. S. 45, 25 S. Ct. 539. See also Schwartz, *The Constitution of the U.S. Part II The Rights of Property*, 54 (1965), and Corwin, *Constitutional Revolution Ltd.*, 39 (1941). The technique was to examine the evidence and

[3]Appellants might conceivably argue that their inadvertence consisted of ignorance of the requirements of the Act. Such an interpretaion would render §5 meaningless. Further, it should be noted that the record is silent as to whether Appellants lacked knowledge of the Act during the two-year grace period or simply elected to ignore it.

policy considerations motivating the legislature and make anew the legislative decision. This weighing or balancing of the interests approach has been repudiated in more recent cases. The proper test is now stated to be whether the legislation bears any reasonable relationship to any legitimate legislative objection; whether under any state of facts that may be assumed, the legislature would have been justified in acting as it did. This view is reflected in *Nebbia* v. *New York* (1934), 291 U. S. 502, 54 S. Ct. 505, and underscored in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154, 58 S. Ct. 778, 784, where a statute was upheld against a due process attack. The Court said:

> ". . . But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."

To a similar effect is *Day-Brite Lighting* v. *Missouri* (1952), 342 U. S. 421, 72 S. Ct. 405.

In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 96 S. Ct. 2882 (1976), the Court held, in ruling upon constitutionality of provisions of the Coal Mine Health and Safety Act of 1969, that due process poses no bar to requiring a coal mine operator to provide compensation for a former miner's death or disability due to illness arising out

of employment in its mine even if the former miner terminated his employment in the industry before the Act was passed, and that Congress did not act arbitrarily in selecting ten and fifteen year figures as reference points for presumptions of disability. In that case, the argument was very strongly made that the burdens of compensation would be unfairly distributed among present mine operators, particularly those who employ far fewer miners presently than previously. The Court acknowledged the validity of these arguments, but with respect to the constitutionality of the Act, said:

> "[3] It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." (428 U. S. at page 14)

and further said with respect to the legislative choice of remedy:

> "We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." (428 U. S. at page 18)

The *Usery* case was cited and relied upon in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59,

98 S. Ct. 2620 (1977). In that case, the Court found no constitutional bar to a Federal act imposing a $560,000,000 limitation on liability for nuclear accidents resulting from the operation of Federally licensed private nuclear power plants.

The statute in this case is designed to facilitate the development of Indiana's natural resources—both surface and subsurface. To that end, it requires the owners of dormant mineral interests to file a doucment every twenty (20) years in order to preserve their interest. As the Indiana Supreme Court said in its opinion in this case:

> "By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind. Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals."

Texaco, Inc., et al. v. *Short, et al.*, Jurisdictional Statement, page A-11. Under the foregoing authorities, the State is permitted to act in the public interest even though the effect may be to interfere with the liberty or property of individuals and even though other schemes might have been wiser or more practical.

B. There Was No "Taking" of the Mineral Claimants' Property Within the Meaning of the Fourteenth Amendment

The statute involved in this case is clearly not a taking for which compensation must be paid, because it is not a taking for public purposes. See Sax, *Taking Private Property and Public Rights*, 81 Yale L.J. 149 (1971); Sax, *Taking; The Notice Power*, 74 Yale L.J. 36 (1964); and *Penn Central Trans. Co.* v. *New York City*, 438 U. S. 104, 135, 98 S. Ct. 2646 (1977).

In *Penn Central*, this Court explored the question as to what kind of governmental action will constitute a "taking" and concluded that:

> ". . . this court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . .
>
> "Government herdly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. *Pennsylvania Coal Co.* v. *Mahon* . . ."

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 397 (1922), is cited by the Court in *Penn. Central Trans. Co.* v. *New York City* as the leading case for the proposition that:

> "a state statute . . . may so frustrate distinct investment—backed expectations as to amount to a taking."

In the *Pennsylvania Coal Co.* case, the statute prohibited the coal company from mining coal in such a manner as to withdraw surface support. That right had been acquired by purchase from the complaining landowner. Rights purchased by the coal company were thus lost by the coal

company immediately and irretrievably upon the statute taking effect. There was nothing the coal company could do to avoid the loss. In the instant case, of course, the statute does not operate at all if the appellant mineral claimants make some use of their property or file a document of record every twenty years. Furthermore, if "investment-backed expectations" are the key consideration, then the fact that the statute in the instant case only operates on speculative interests which have been dormant for a period of twenty years, would seem to clearly take it beyond the scope of *Pennsylvania Coal Co.* v. *Mahon.* See *Goldblatt* v. *Town of Hempstead* (1922), 369 U. S. 393, where the Court found no taking under a Town Ordinance which effectively extinguished certain mineral rights by prohibiting excavation under a water line.

The statute in the instant case regulates the relationship between owners of interests in a given tract of land and as such a regulation it is only necessary that it bear a reasonable relationship to a proper legislative objective. That it does bear such a relationship is demonstrated by those cases which have dealt with similar legislative attempts to keep land titles current and marketable, discussed in the sections of this brief that follow.

C. Similar State Legislation Has Been Upheld Against Constitutional Attack

While the constitutionality of this statute must be determined on the basis of principles and rules laid down by this Court, it is material to the inquiry to note the manner in which similar statutes and closely related legislation operate on land and have been treated by the state courts. This is particularly true since this Court has not frequently dealt with the kind of legislation here involved and a large

body of law has been developed by state courts dealing with these questions.

The general statutes of limitation with respect to the bringing of an action to recover possession of real estate have an effect upon real estate almost identical to that of the instant case, and they operate in much the same manner. See, e.g., Ind. Code 34-1-2-2. In both cases, title to real estate is lost because of failure to assert one's right thereto within a period prescribed by the statute. The action required by the statute of limitation is the filing of a lawsuit. The action required by the Dormant Mineral Act is the filing of a document with the recorder of deeds. In both instances, the interest can also be preserved by actual possession or use of the property. In operation and effect then the Dormant Mineral Act and the doctrine of adverse possession (as codified in statutes of limitation) are identical. If it be argued that the statute of limitation can be distinguished because there the owner is given notice of the peril to his property by the possession of the adverse claimant, which the law requires to be open and notorious for that very reason, then the answer is that the law itself, in the instant case, gives notice to the mineral owner that his property is in peril, and that he must act to preserve it.[4]

The mineral claimant in *Pond* further contends that statutes of limitation are not analogous because (1) they are devices to protect the integrity of the judicial process by excising stale claims; and (2) their impact is procedural rather than substantive. *Pond* also argues that

[4]It is noteworthy that statutes of limitation in general have no conditions or requirements equivalent to adverse possession; i.e., the person in whose favor the statute is running has no duty to notify his prospective opponent that he intends to rely upon the statute of limitation as a defense if suit is filed.

the Act encourages litigation of factual issues presently difficult to prove. The latter argument surely is not seriously advanced. In Indiana, mineral development of all kinds for more than fifty years has been subject to detailed regulation, control and historical record making.[5] Proof of payment of taxes, or of use or non-use of mineral rights for twenty years immediately preceding a given date, would surely require only minimal effort and expertise in evidentiary matters. With regard to the former, the landowners submit that ultimately all wealth springs from the land and its integrity is as important as that of the judicial system.

The distinction between substance and procedure was argued by the mineral claimants in the Courts below on the theory that a statute of limitation bars the remedy, leaving the right intact. Whatever may be the law in other areas, it was long ago settled that with respect to property the running of the limitation period results in a transfer of title. See opinion of Holmes, J. in *Chapin* v. *Freeland* (1886), 142 Mass. 383, 8 N. E. 128. This Court has also recognized that the distinction between barring the remedy and extinguishing the right is no longer valid. *El Paso* v. *Simmons* (1964), 379 U. S. 497, 85 S. Ct. 577. To the same effect is *State* v. *La. Oil Ref. Corp.*, 176 So. 686 (La. App. 1937), where it is said:

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[5]See, e.g., Ind. Code Chapters 13-4-7; 13-4-1; 22-1-1 and 22-10-1. Texaco advances a similar argument at page 13 of its brief, stating that oil and gas operators will not be able to rely on the record. Experienced title examiners know that titles to mineral lands are frequently cluttered with unreleased leases and term interests expiring when production ceases, even though no development has ever actually occurred on the land. The Dormant Mineral Act introduces no new risks of this nature but does provide a means, however clumsy, of eliminating at least some of these risks.

> "Real and personal property may be acquired by prescription as against the true owner, yet no one contends that laws recognizing this method of acquisition deprive the owner of his property without due process of law or deny him equal protection of the laws."

The marketable title statutes, patterned on the MODEL MARKETABLE TITLE ACT, adopted in several States, also have an operation and purpose similar to the statute involved in this case. Their purpose is to clear titles of stale claims and they operate to extinguish property interests which are based upon transactions of record predating the root of title of the person in whose favor the statute operates. The root of title of such person must, in order to extinguish prior claims, have been of record for a minimum period which varies from twenty years (see North Dakota CC. 47-19A-01) to the fifty-year period of the Indiana Statute, I.C. 32-1-5-1, and it must not be expressly subject to the prior claim. The claim being extinguished may be a future interest or a present interest and it may be a possessory interest. In fact, the true fee simple ownership of one in possession may be extinguished because the statute operates in favor of one whose *record* root of title goes back fifty years without regard to whether such person is in possession. Furthermore, many of the marketable title statutes will operate to cut off mineral interests such as the ones involved in this case. The Indiana Act, which is the model Act, would, in fact, appear to do so. Simes and Taylor, *Improvement of Conveyancing by Legislation*, at 240 (1960).

The mineral claimants' contention that the marketable title acts "decide between competing claims to the same property", while the Dormant Mineral Act "creates conflicting claims between surface owners and the severed

mineral interest owners which would not otherwise arise", demonstrates a lack of understanding of both the model act and the statute involved in this case because there is simply no such distinction to be made. Both the Model Marketable Title Act and the Dormant Mineral Act operate to terminate interests in real estate which have been carved out of the residual fee, including mineral interests. Both terminate interests which, except for the act, would have continued to be valid, subsisting interests, and, therefore, both acts "create the conflicting claims."[6]

Marketable title acts such as the one adopted in Indiana have been held to be constitutional. In Bayse, *Clearing Land Titles,* 384 (1970), it is said:

> "The constitutionality of the Marketable Title Acts have been questioned on three grounds: (1) that they are retroactive in character; (2) that their operation deprives persons of their property without due process of law; and (3) that they impair contract rights. They have been upheld on each count."

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[6]Thus, for example, if the fee simple interest in a tract of Indiana land was fragmented in 1920, whether it be by creation of a life estate and remainder, or by severance of the minerals from the residual fee, and if the next conveyance relating to the land is in 1925 and is by the life tenant or the surface owner, as the case may be, and that conveyance simply describes the land and is not expressly made subject to the outstanding title fragment (i.e., the remainder or the mineral interest), the 1926 conveyance becomes a root of title which in 1975 will operate to extinguish the title fragment. The Act will not operate, of course, if the fragment itself is the subject of a recorded conveyance between 1925 and 1975, but if it is not, and if none of the other exceptions in the Act are applicable, the title fragment will be extinguished. This is true even if the title fragment was itself of record and the conveyance in 1925 was, therefore, as a matter of law, subject to it. It is, therefore, apparent, as has been said, that the Marketable Title Act itself

(Footnote continued on next page)

The Minnesota Marketable Title Act was upheld in *Wichelman* v. *Messner,* 250 Minn. 88, 83 N. W. 2d 800, 71 A.L.R. 2d 8.6 (1957); the Iowa statute was sustained in *Tesdell* v. *Hanes,* 248 Iowa 742, 82 N. W. 2d 119 (1957); the Florida statute was upheld in *City of Miami* v. *St. Joe Paper Co.,* 347 S. W. 2d 622 (1977). See also Simes and Taylor, *Improvement of Conveyancing by Legislation,* 253 (1960); Aigler, *A Supplement to "Constitutionality of Marketable Title Acts,"* 1951-1957, 56 Mich. L. Rev. 225 (1957).

Another fairly common title curative statute operating to extinguish otherwise valid and subsisting interests in land is that which terminates future interests which follow defeasible fee interests. Such statutes typically provide that such future interests cannot endure for more than a stated period of time (see, e.g., Ill. Rev. Stat., 1953, Ch. 30, §§ 37e and 37f), and are typically made applicable to existing interests. The Illinois statute has been held to be constitutional, *Trustees of Schools of Township No. 1* v. *Batdorf,* 6 Ill. 2d 486, 130 N. E. 2d 111 (1955). Similar statutes have been held to be valid in Iowa *(Presbytery of Southeast Iowa* v. *Harris,* 226 N. W. 2d 232 (1975); Nebraska *(Hiddleston* v. *Nebraska Jewish Education So-*

(Footnote continued from preceding page)
"creates the conflict" between the title reflected in the root of title and the title fragment, and the Marketable Title Act operates to terminate the one in favor of the other. The Marketable Title Act operates because of inactivity *of record* with respect to the title fragment. If one adds to the hypothetical the fact that the severed mineral owner failed to produce minerals subsequent to 1955, and did not file a statement of claim of record, as provided for in the Dormant Mineral Act, the Dormant Mineral Act will also operate to terminate the interest in 1975. Thus, both the Marketable Title Act and the Dormant Mineral Act would have operated to terminate an otherwise valid interest; the one because of inactivity of record and the other because of inactivity on the land itself.

ciety, 186 Neb. 786, 186 N. W. 2d 904 (1971); Kentucky *(Cline* v. *Johnson County Board of Education,* 548 S. W. 2d 507 (1977) and Massachusetts *(Town of Brookline* v. *Carey,* 355 Mass. 424, 245 F. Supp. 1076 (D. Mass. 1968)).

Another long established statutory scheme which operates in a manner almost identical to the act involved in this case is the Louisiana liberative prescription doctrine. In that State, it is held that a code provision which causes easements to terminate after ten years of non-use is applicable to severed mineral interests. Article 789, Louisiana Code (West's La. Civ. Anno. 1973).

Since Louisiana classifies mineral interests as incorporeal, and, therefore, servitudes within the meaning of the code provision, the Louisiana Courts very early applied the code provision to severed mineral interests. *Frost-Johnson Lbr. Co.* v. *Sallings Heirs,* 150 La. 756, 91 So. 207 (1920). The effect is that non-production of the minerals for a period of ten years on a tract on which the ownership of the minerals has been severed from the surface will cause the severed mineral interest to terminate. In other words, when the servitude is not being used a prescriptive period is running in favor of the owner of the burdened land and a continuation of that non-use for ten (10) years will liberate the servient estate from the burden of the servitude. Thus, the doctrine is called "liberative prescription." (See Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines,* 25 Tulane Law Review 30 (1950).)

In a manner similar to Louisiana, Indiana classifies severed mineral interests as incorporeal. *Monon Coal Co.* v. *Riggs,* 115 Ind. App. 236 (1944); *Halbert* v. *Hendrix,* 121 Ind. App. 43 (1950). Under fact similar to this case, some Courts have held such interests to be extinguished by abandonment. 1 Williams and Meyers, *Oil and Gas Law,* 108.

In *Gerhard* v. *Stephens*, 68 Cal. 2d 864, 69 Cal. Reptr. 612, 442 P. 2d 692, 31 O. & G. R. 28 (1968), the Court held that severed mineral interests may be lost by abandonment and that proof of abandonment may consist of evidence of nonuse together with evidence of circumstances concerning "economic exigencies and external realities." The use of the quoted phrase was simply a device whereby the Court was able to apply the abandonment doctrine without any direct evidence of intent to abandon. It is, therefore, clear that the California Courts and Louisiana were doing, judicially, precisely what the Indiana legislature has attempted to do by statute. It is also clear that the reasons for the California decision were the same as those which motivated the Indiana legislature. The Court said:

> "If interests in real property can be and are abandoned, they do not become, as in the case of personal property, the property of the first appropriator . . . but instead return to the estate out of which they were carved. . . . [A] perpetual right to remove oil and gas would ordinarily revert to the surface estate, thereby freeing that estate of its burden and permitting its owner more complete utilization and enjoyment of his property.
>
> . . .
>
> "Commentators have noted that 'The abandonment concept, when applied, frequently serves the very useful purpose of clearing title to land of mineral interests of long standing, the existence of which may impede the exploration or development of the premises by reason of difficulty of obtaining the joinder of such owners.'"

No one would, of course, question the power of the California Court to meet this problem by adopting a rule that severed mineral interests can be lost by abandon-

ment nor that Court's power to fix the standards for determining when an abandonment has occurred. If that is true, then the Indiana legislature should have at least as much power to meet the same problem in almost precisely the same manner.[7]

D. The Retroactive Features of the Act Satisfy the Requirements of Due Process

As lawyers are wont to do, the mineral claimants in this case pursue their objective over many paths simultaneously. Ultimately, all paths lead to the same question: On what terms can the State make the Act applicable to interests created prior to its effective date? The landowners submit that such power does exist, provided only that the owner of the interest must be given a reasonable opportunity after passage of the Act to preserve it.

Statutes of limitation have been held to operate so as to terminate rights in existence at the time the statute was adoped and of unlimited duration when created. A very early Indiana case involved just such facts. In *Prichard* v. *Spencer,* 2 Ind. 486 (1851), it was held that a six-year statute of limitation which became effective in March of 1844 applied to bar an action commenced in June of 1848 on facts arising prior to June of 1842, at which time no statute of limitation applied to the transaction. The Court said:

> "It is a well-settled principle of law that courts are to give statutes a prospective operation where there is nothing indicating a different intention on the part of the legislature which enacted the statutes. It is an

[7]Although its constitutionality has apparently not been tested, it is interesting to note that Congress has its own version of the Dormant Mineral Act pertaining to Federal lands. 43 U.S.C.A. §1744. This Act provides a grace period of three (3) years after its effective date for filing instruments of claim.

equally well-settled principle that the legislature may enact retrospective limitation laws where they do not deprive parties of a reasonable time for prosecuting their claims before being barred."

In *Mahood* v. *Bessemer Properties, Inc.*, 18 So. 2d 775, 153 A.L.R. 1199 (Fla. 1944), the Court said:

"A statute providing that within a reasonable time after its passage existing contracts shall be filed or recorded is constitutional. See *Henry* v. *Myers*, 76 Kan. 723, 93 P. 2d 168, 173, 17 L.R.A. (N.S.) 779. A statute imposing additional duties on the owner of a contract so that the same may be preserved is not void nor is a statute which allows a *reasonable time or notice* prior to steps for enforcement. See *State ex rel. Nat. Bond & Security Co.* v. *Krahmer*, (N.S.) 157." [emphasis supplied]

In *Wichelman* v. *Messner*, (see footnote 8), 250 Minn. 88, 83 N. W. 2d 800, 71 A.L.R. 2d 816 (1957), it is said:

"The constitutional prohibitions against retrospective legislation do not apply to statutes of limitation, 'for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right'.

. . .

"What may be a reasonable time depends upon the sound discretion of the legislature in light of the nature of the subject and purposes of the enactment and we have said that 'the courts will not enquire into the wisdom of the exercise of this discretion by the legislature . . . *unless the time allowed is manfestly so short as to amount to a practical denial of justice.* [emphasis supplied]. *Hill* v. *Townley*, 45 Minn. 167, 169, 47 N. W. 653, 654; Note, 33 Minn. L. Rev. 54."

To the same effect are *Opinion of the Justices*, 338 N. E. 2d 806 (Mass. 1975); *Allen* v. *Dowell*, 66 A. 2d 795 (Md. 1949);

Kazisck v. *Brighton*, 210 N. W. 622, 49 A.L.R. 1260 (Minn. 1926).[8]

The Louisiana doctrine of liberative prescription also owes some of its origin to the Louisiana Courts. While it is based upon provisions of the civil code relating to incorporeal interests, it was not always clear that those provisions would be applied to mineral interests. See Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines*, 25 Tulane L. Rev. 30 (1950). The first cases to apply it to mineral interests did so, however, with no thought being given to the proposition that such retroactivity might be constitutionally objectionable. See *Frost-Johnson Lumber Company* v. *Sallings Heirs*, 150 La. 756, 91 So. 207 (1920). Subsequent statutory modifications of the liberative prescription doctrine have been applied retroactively and they have been sustained against constitutional attacks similar to those involved in this case. In *Miri* v. *Hawkins*, 177 So. 2d 795 (La. 1965), the Court said:

> "With respect to the retroactive application of the 1950 enactment, statutes repealing a former cause for the suspension of prescription may be given retroactive application, if so intended; at least so long as a reasonable time is provided for the assertion of any rights adversely affected thereby."

See also *Cooper* v. *Lykes*, 40 So. 2d 3 (La. 1950).

The statutes placing limits upon the duration of the future interests which follow defeasible fees have also been held to be constitutionally permissible even though they

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[8]The A.L.R. annotation which follows this case deals with grace periods which appear in a variety of statutes and which have been held to be reasonable. That annotation is supplemented in 120 A.L.R. 758.

applied to existing interests. All of the cases heretofore cited in regard to such statutes involved the retroactivity issue. The holdings of those cases are summarized in *Presbytery of Southeast Iowa* v. *Harris*, 226 N. W. 2d 232, 240 (1975), where the Court said:

> "Defendants assertion to the effect § 614.24 denied them due process of law because it retroactively eliminated vested rights before the right of enforcement arises simply fails under any applicable test. The public interest served by § 614.24 is self-evident. Its cognate enactment, Code § 614.17, in effect for over forty years, serves to bar interests which have not been protected by timely filing of the required claim."

It is the very nature of marketable title legislation, of course, that it be given retroactive effect and all the decisions sustaining such legislation have involved the constitutionality of the retroactive provisions.[9]

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[9]The leading case on the subject seems to be *Wichelman* v. *Messner*, 250 Minn. 88, 83 N. W. 2d 800, 71 A.L.R. 2d 816 (1957). In a lengthy and well written opinion the Minnesota Supreme Court dealt with and disposed of just about every constitutional question raised in this case. Among other things, the Court said:

". . . The recordation provisions of the Act provide for a simple and easy method by which the owner of an existing old interest may preserve it. If he fails to take the step in filing the notice as provided, he has only himself to blame if his interest is extinguished. 'The constitutionality of imposing this duty would seem to have been settled beyond question by the decisions sustaining retroactive recording statutes.' Scurlock, *Retroactive Legislation Affecting Interests in Land*, Michigan Legal Studies, p. 82; . . .

"It is recognized that an amendment to a recording statute which shortens or limits the time during which a recorded instrument shall be effective and provides for renewal of such instrument by re-recording or refiling is constitutional as to existing recorded instruments where a reasonable time is al-

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The mineral claimants do not argue that the grace period in this case was too short. They contend that the retroactive features of the Act must be tested by the procedural due process standards contained in *Mullane* v. *Central Hanover Bank and Trust Co.* (1950), 339 U. S. 306, 70 S. Ct. 652, 494 L. Ed. 865, *Bell* v. *Burson* (1971), 402 U. S. 535, 91 S. Ct. 1586 and *Fuentes* v. *Shevin* (1972), 407 U. S. 67, 92 S. Ct. 1883. This argument suggests that although the statute represents a proper means of accomplishing a legitimate legislative objective, it cannot constitutionally do so unless it incorporates an administrative proceeding whereby the affected parties are given notice of the potential application of the statute to them and an opportunity after such notice, not only to avoid the consequences by filing, but also to disprove the facts upon which the application of the statute is to depend. The statute, it is argued, could not be effective, in any particular case until after the hearing. It is constitutionally impermissible, in other words, to enact a statute which is self-executing; one which fixes the rights of parties upon the concurrence of certain facts prior to, or in the absence of, an administrative hearing.[10]

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lowed for compliance with the statute. . . . In *Jackson ex. dem. Hart* v. *Lamphire*, 3 Pet. 280, 190, 28 U. S. 290, 7 L. Ed. 679, 683, the Supreme Court of the United States said that whether the statute be 'considered as an act of limitations or as a law sui generis' it is immune to constitutional objections.

[10]Thus, the appellants in *Pond* v. *Walden* say, on page 16 of their brief (in relation to the Indiana Act);

"It similarly provides no opportunity for them to appear in any forum, administrative or judicial, to declare their interest in the property or to show that they would have met the statute

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A similar notion was the basis for the decision in *Chicago and Northwestern Trans. Co.* v. *Pederson* (1970), 80 Wis. 2d 566, 259 N. W. 2d 316, cited by both appellants. In that case, the Wisconsin Court struck down a statute similar to the one involved here. In doing so, the Court said:

> "In this case, the plaintiffs' mineral rights will revert to the surface owner if they are not registered or taxes paid on them. *At least the plaintiffs must have a hearing where they can question the determination of the registrar of deeds that the registration has not been done and that the taxes have not been paid.*" [emphasis supplied]

This contention is contrary to several centuries of Anglo-American legal tradition. The self-executing statute providing for the accrual or transfer of rights upon the occurrence of stated facts has been the rule rather than the exception in our legal system. It has always been true, of course, that if there is any dispute as to the existence of the facts upon which the operation of the statute depends, resort may be had to judicial proceedings and in such judicial proceedings, the due process requirements of notice and hearing must be accorded. See

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requirements had they known of them. It does not even give them an opportunity to show that they did, in fact, meet the requirements of the act."

Similarly, the appellants in *Texaco* v. *Short* say, at page 23 of their brief:

> "The effect of the act is to take the mineral owner's property because he did not use it for twenty years and did not re-record his interest within the twenty-year period. No notice was given of the lack of re-recording before the forfeiture occurred. At the very least, such notice should be required before application of the draconion remedy of extinguishment."

Londoner v. *Denner*, 210 U. S. 373 (1908) and *Bi-Metalic Investment Co.* v. *Colorado*, 239 U. S. 441 (1915). Once such a hearing is held, however, and it is determined that the necessary facts exist, the statute will be held to have been applicable as of the time the facts occurred. It has never been true in our legal system that the law only becomes applicable upon the completion of judicial proceedings. It may be true that in recent years many laws have been adopted which provide for administrative enforcement, and it may also be true that the administrative process may include an assumption that the law will not affect the rights of the parties until completion of the administrative process. It does not follow, however, that the administrative process has completely displaced the self-executing statute and no court in the United States, other than the Wisconsin and Illinois Supreme Courts and the trial court in this case, has ever so held.

None of the decisions of this Court cited by appellants lend support to this argument. In none of the cited cases does this Court hold anything more than that when the enforcement machinery of the legal system is brought to bear upon a particular situation, there must be an opportunity for the affected parties to be heard. This is true whether the action of the state is for the purpose of making a binding adjudication concerning the application of the law to the facts, or whether it takes the form of action by an official of the state in opposition to the rights of an individual. In all of these cases, the enforcement machinery, the power of the state, is being utilized to make general laws applicable to the individuals involved in a particular transaction.

Thus, in *Mullane* v. *Central Hanover Bank and Trust Co., supra*, a trustee's report was to be made binding by

adjudication upon the beneficiaries, and the Court held that such a result must be preceded by notice. In *Bell* v. *Burson, supra,* an individual's drivers license was being revoked and the Court held that unless a hearing preceded the deprivation it was a violation of the constitution. The same is true of *Fuentes* v. *Shevin, supra,* and *Sniadach* v. *Family Finance Corp. of Bayview,* 395 U. S. 337 (1969). In both of those cases, the power of the State was brought to bear upon one of the parties to a dispute prior to a hearing. In both cases, this Court held that the action was inconsistent with the due process clause because it was not preceded by notice of hearing. In none of these cases, however, is it held that the self-executing statute is constitutionally improper.

It is, therefore, apparent that if the notice the mineral claimants claim they were denied was the kind of notice which our system requires prior to the enforcement machinery of the State being used to make general laws applicable to particular situation, then they received that notice when the suit was filed in the instant case wherein it was contended that their interests had terminated under the provisions of the Indiana Mineral Lapse Statute. On the other hand, the mineral claimants seem to confuse the notice involved in judicial proceedings with the notice, or lack of it, which one has of the application of general rules to one's particular situation. Thus, they argue that a legislature cannot adopt a general rule which will affect individuals without giving notice to all individuals who might be affected. On page 23 of Appellants' brief in *Texaco* v. *Short,* it is contended:

> "Suffice it to say that if this Court would not approve the notice by publication in a newspaper in Mullane, supra, because it was 'not reasonably calculated to

> reach those who could easily be informed by other means at hand' such notice of the adoption of the act would not satisfy the due process requirement."

Everyone is presumed to have notice of the law. Any system which required the lawmaker to give personal notice to everyone who might be affected by the law would be unworkable.

In dealing with this issue in the cases at bar, the Indiana Supreme Court cited, among other cases, *Turner* v. *People of State of New York* (1897), 168 U. S. 90, 18 S. Ct. 38, 42 L. Ed. 392, and *Wilson* v. *Iseminger* (1902), 185 U. S. 55, 22 S. Ct. 573, 46 L. Ed. 804. The statutes in both of these cases deal severely with rights in real property and do so on the basis of provision for a grace period rather than administrative or judicial notice to the affected persons. In *Turner*, it was held that a State statute declaring that past sales and conveyances by a comptroller for non-payment of taxes would be conclusively presumed regular six months after the effective date of the act. The six months time period was held to provide a reasonable time for bringing an action. In *Wilson*, this Court upheld a statute which barred actions to recover ground rents and extinguished totally the right to recover further such rents after twenty-one years had expired during which no declaration or acknowledgement of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after passage of the act. The Court held that the act gave a reasonable time to the owners of ground rents for preserving their rights. With regard to the *Wilson* case, the Indiana Supreme Court stated (Texaco, Inc., Jurisdictional Statement, page 89):

> "This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration."

The Indiana Supreme Court also cited *Hawkins* v. *Barney's Lessee* (1831), 5 Pet. 457, 8 L. Ed. 190, and *Terry* v. *Anderson* (1877), 95 U. S. 628, 24 L. Ed. 365, both of which cases upheld acts of limitation. With regard to these cases, the Indiana Court noted:

> "The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer of right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act."

Texaco, Inc., Jurisdictional Statement, page A-8.

In *Texaco,* the mineral claimant argues that the Act does not satisfy the due process factors identified in *Mathews* v. *Eldridge,* 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The factors may be entirely appropriate, but Texaco has misconceived the facts applicable thereto. In this case, there is no private interest affected by official action because the Act provides for no official action. The risk of "erroneous deprivation" is reduced by a time honored substitute procedural safeguard which is the two-year grace period, and the State's interest in minimizing fiscal and administrative burdens is substantial in relation to the value of the interests involved since there is no practical way for the State to provide actual notice to a limited number of affected citizens of the provisions of its laws. Indeed, Texaco, as indicated above, actually argues that the law cannot be effective because the manner of its publication does not satisfy the notice requirements of *Mullane.*

This argument applies with equal force to every statute the Indiana General Assembly has ever enacted which in any way affects or limits property rights.

E. Most of the Cases Involving Other Dormant Mineral Acts Have Upheld Them

Any decision concerning the constitutionality of the statute involved in this case must rely heavily upon precedents from analogous situations such as those discussed above. This is true because statutes of this kind are of relatively recent origin. (See Street, *Need for Legislation to eliminate Dormant Royalty Interests*, 42 Mich. St. B. J. 49 (March 1963). Several states have, however, in recent years, adopted statutes similar to the Indiana Act[11] (See 1 Williams and Meyers, *Oil and Gas Law*, § 216.47) and there have been some cases decided concerning the constitutionality of those acts. These statutes utilize a variety of approaches. The Nebraska and Illinois statutes proceed on the assumption that non-use for a period of years results in abandonment. Section 57-229 of the Nebraska statute, for example, provides:

> "a severed mineral interest shall be abandoned unless the record owner of such mineral interest has within twenty-three years immediately prior to the filing of

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[11]Similar statutes have been adopted in Illinois (Smith-Hurd Illinois Annotated Statutes, §§ 30:197-198); Michigan (Michigan Statutes Annotated §§ 26.1163(1)-26.1163(4)); Nebraska (Stat. Nebraska 1943, § 57-228 to 57-231); Florida (F.S.A. § 704.05 (enacted in 1970) but subsequently amended in Laws of Fla. 73-140 (1973) and 75-94 (1975)—see 1 Williams and Meyers, *Oil and Gas Law*, § 216.74); Georgia (Ga. Code § 85-407.1); Virigina (Va. Code §§ 55-154 and 55-155); Tennessee (Tenn. Code, Ann. § 64-704); Wisconsin (Wis. Stat. Ann. 700.30); and South Dakota (S.D. Codified Laws Anno. § 43-30-8.1 (Supp. 1979).

> the action provided for . . . exercised publicity the right of ownership."

The Virginia statute proceeds upon the theory that nonuse for a period of thirty-five years creates a prima facie case that there are no minerals under the land. The Act provides for institution of a suit by the surface owner. If the mineral owner does not proceed to discover minerals under the land within six months after institution of the suit, the Court "shall enter a decree declaring the claim or right to be a cloud on the title and releasing the land therefrom and extinguishing the same." (Section 55-155 of the Va. statute).

The Georgia statute expressly utilizes a theory of adverse possession similar to the Louisiana liberative prescription doctrine. Ga. Code § 85-407.1.

The Virginia statute was challenged in *Love* v. *Lynchburg Nat. Bank & Trust Co.*, 205 Va. 860, 140 S. E. 2d 650, in which a severed mineral owner claimed the statute deprived him of property without due process. The Virginia Court sustained the validity of the statute stating at page 653 in the Southeastern Reporter:

> "No legislative act may be declared unconstitutional except where it is clearly and plainly so. The legislature has a right to enact particular rules of evidence, to establish rights and to justify the extinguishment of rights."

The Georgia statute was involved in litigation shortly after its adoption. The case was *Nelson* v. *Bloodworth*, (1977), 232 S. W. 2d 547, a suit by a landowner to have his ownership declared to be free of a severed mineral interest. The Court held that the statute was meant to apply only prospectively, and no question was raised by the Court

as to the constitutionality of the Act as so applied. The limitation to prospective application, however, only meant that the period required to cut off an interest under the statute must all follow the effective date of the statute. It was quite clearly held that the statute applied to existing interests and that such interests would terminate upon the lapse of the specified period after the effective date of the Act. Such a holding seems justified in view of the fact that the Georgia statute declared that, upon its effective date, possession of the surface estate carried with it possession of the mineral estate, contrary to the holding of previous Georgia cases. It, therefore, seems logical that the seven years possession required by the Act would have to accrue subsequent to the passage of the Act. This is particularly true since the Act contained nothing to indicate a contrary intent such as a grace period for those cases in which the statutory period might have run prior to the effective date of the Act. Thus, the Indiana Act has precisely the same effect as was held to be constitutional in the Georgia case. It provides for the termination of existing interests upon the lapse of a specified period following the effective date of the Act.

A Florida statute, similar in many respects to the Indiana Act under consideration, was tested in *Trustees of Tufts College* v. *Triple R. Ranch, Inc.*, (Fla. 1977), 275 So. 2d 521, and the conclusions reached by the Court in that case are entirely consistent with the contentions of the landowners in this case. The statute involved there differed from the Indiana Act in that it did not provide for a period after the effective date of the Act in which the owner of a mineral interest could act to preserve his interest and did not provide for re-filing. The statute provided:

704.05 Easements and rights of entry.—

(1) The rights of entry, or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing, *shall* be limited to a twenty (20) year period beginning with the recording of such conveyance or devise if such rights are not exercised during this twenty (20) year period.

(2) After the twenty (20) year period has expired, the owner of such property *may* file a suit in the circuit court of the county in which the property is located, and upon such procedure as used in quieting title the court shall, upon proof of the nonexercise of such rights and the expiration of the twenty (20) year limitation, enter a decree forever clearing and confirming the removal of said rights from the title to the said real estate. [emphasis supplied]

The Florida Supreme Court held that the statute should be applied only prospectively to interests created after the effective date of the Act. The reason for doing so was the absence in the statute, of a grace period wherein those whose interests had been unused for the twenty years prior to the effective date of the Act, could preserve them. *Ibid,* at page 528.

The Supreme Court of Michigan recently held a similar Michigan statute to be constitutional after a split between decisions of the Appellate Courts of that State on the question. *Van Slooten* v. *Larsen,* 299 N. W. 2d 704, (Mich. 1980). In doing this, the Court said (at page 706):

> "The Dormant Mineral Act was a thoughtful response by the legislature to a perceived problem based on the experience and history of the developing oil and gas industry in this State, and on the experience of other oil and gas producing States."

In addition to the decisions in Virginia, Georgia, Florida, Michigan and Indiana, which are direct authority regarding the constitutionality of the Indiana statute, there are also, as already pointed out, cases upholding the application of the Louisiana code which operates even more severely upon severed mineral interests than does the Indiana statute, and there is the California decision which utilizes an abandonment doctrine to reach the same result, in almost identical situations, as the Indiana Statute. Opposed to this rather substantial body of authority are four cases. They are *C. & N.W. Transportation Co.* v. *Peterson* (1980), 80 Wis. 2d 566, 259 N. W. 2d 316; *Wheelock* v. *Heath,* 201 Neb. 835, 272 N. W. 2d 768 (1978); *Wilson* v. *Bishop,* (1980) 82 Ill. 2d 364, 412 N. E. 2d 522; and *Contos* v. *Herbst,* 278 N. W. 2d 732 (Minn. 1979). The Wisconsin case seems to be based primarily upon procedural due process objections. The unsoundness of that approach is discussed above in this brief. The Illinois Court in *Wilson* v. *Bishop* relied heavily upon the Wisconsin decision and generally used the same reasoning. *Wheelock* v. *Heath* relied upon, and, in fact, cited little or no authority other than the decision of one of the Michigan intermediate Appellate Courts, which decision was later set aside by the Michigan Supreme Court in *Van Slooten* v. *Larsen, supra.* The Minnesota case dealt with a statute that was considerably different in its operation and effect than the other statutes under consideration. That act provided for forfeiture of the severed mineral interest to the State upon failure to file a document by the owner of the interest. The State was only required to give notice of the filing requirement by publication. The Court held that the notice provision did not comply with due process requirements. The Minnesota decision, therefore, is nothing

more than a decision that in condemnation cases the notice must be adequate to inform the condemnee of the action. It has little to do with the issues in this case.

F. The Statute Does Not Deny Equal Protection of the Laws

The mineral claimants contend that the statute in question also violates the equal protection clause of the Fourteenth Amendment because of the exception to the filing requirement contained in I.C. 32-5-11-5. It will be recalled that the owner of ten or more mineral interests in the same county, *who is making a diligent effort to preserve all of them but neglects to do so with respect to one or more of them,* does not, upon the expiration of the statutory period, automatically lose the interests with respect to which he fails to file. Such interests will only be terminated if the owner thereof fails to file within 60 days after the surface owner publishes a notice of lapse. Defendants claim that if they do not get the advantage of the "inadvertance" exception, because of their lack of ownership of ten or more mineral interests, the Act unconstitutionally discriminates against them.

It is true that not every mineral owner, whose interest is affected by the Act, is going to be able to bring himself within the provisions of section 32-5-11-5, but that fact alone does not render the clause constitutionally objectionable. The statute does make reasonable classifications and does apply to all who meet its conditions. Nothing more is required of a legislative act.

The exception is a legislative response to a problem peculiar to the Indiana mineral industry. Mineral severances in Indiana began in the middle of the last century with the coming of the coal industry. Many more were

created by the oil and gas industry early in this century. (See Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles,* 7 Land and Water L. Rev., (1972)). Frequently, these old conveyances cloud titles and prevent the development of mineral deposits today because the owners cannot be located. Others, however, represent interests owned by individuals or companies that very much intend to develop the minerals. A coal company may have to assemble hundreds of such interests to mine a single seam of coal, and the titles thereto may be extremely complex. Further, the industry is so tied to the electric power industry that reserves are aften acquired 20 to 50 years ahead of intended use. The legislature made a judgment that if the individual or company was making a diligent effort to preserve its interests in such a situation, the whole venture should not be brought to a standstill because of failure to preserve a single interest. The policy of the Act, to facilitate the development of mineral interests, would not be served by such a law. Yet such failures might and would likely occur as clerical misdescriptions and omissions. The choice of 10 interests — as opposed to any other number — as the point at which relief from inadvertance might be justified if diligence were not lacking, was likewise a rational legislative judgment.

But to make a general inadvertance exception would render the Act less effective. If the privilege of filing a delayed statement of claim applied to all mineral owners, instead of just those who meet the conditions of I.C. 32-5-11-5, it is possible that many interests would be preserved which were of a kind the Act was expressly designed to eliminate. Suppose for example, that a coal company went out of business in 1910 owning most of the coal

underlying the land in a given area, and that no one in the area knew who succeeded to the company's interests. It is likely that when the notices required by 32-5-11-5 began appearing in the paper, some local speculator would make it a point to find the successors in interest of the coal company and attempt to acquire their rights for the purpose of preserving them. It is likely, in fact, that many statements of claim would be filed by persons who only hoped to locate the real owner. Either activity would only further cloud the title and not further the true purpose of the Act —to encourage prompt exploitation or abandonment of mineral rights. The possibility that such things could occur is sufficient basis for the legislature to narrowly restrict the inadvertance exception to those who are making a diligent effort to comply with the statute.

The legislature can make laws that apply to different persons in different ways so long as the classification has a reasonable basis or tends in some reasonable way to further a legitimate legislative objective. In *Puget Sound Power and Light Co.* v. *Seattle* (1934), 291 U. S. 619, 624, 54 S. Ct. 542, this Court said:

> "The equal protection clause does not forbid discrimination with respect to things that are different."

and in *Brown Forman Co.* v. *Kentucky*, (1910), 217 U. S. 563, 30 S. Ct. 578:

> "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the laws."

Wichelman v. *Messner*, (1957), 250 Minn. 88, 83 N. W. 2d 300, 71 A.L.R. 2d 816, considered the constitutionality of exceptions to the Minnesota Marketable Title Act, which has a purpose and operation similar to the Act involved in

this case. In that regard, the Court said, at page 324 of the Northwestern Reporter:

> "The constitutional prohibition . . . does not prevent the legislature from dividing a subject into classes and a classification made pursuant to a public purpose which has a rational basis upon any conceivable state of the facts, although the court does not perceive all the facts justifying the classification is not invalid. The responsibility for such classification rests primarily with the legislature and will be held proper if (a) the classification applies to and embraces all who are similarly situated . . . (b) the distinctions are not manifestly arbitrary or forceful . . . and (c) there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide."

To the same effect are *Lower Vein Coal Co.* v. *Industrial Board of Indiana*, (1921), 255 U. S. 144, 41 S. Ct. 252, wherein this Court upheld an Indiana statute that distinguished between coal companies and other employers and *State Board of Tax Comm's. of Indiana* v. *Jackson*, (1931), 283 U. S. 527, 51 S. Ct. 540, in which this Court upheld a statute which taxed the owner of five or more stores at a different rate per store than one who owned less than five stores. In the latter case, this Court quoted from *Brown Forman Co.* v. *Kentucky*, (1910), 217 U. S. 563, 573.

City of New Orleans v. *Dukes*, (1976), 427 U. S. 297, 96 S. Ct. 2513, is a recent expression of this Court concerning the operation of equal protection in the economic sphere. A New Orleans ordinance prohibited the sale of food from push carts in the French Quarter except by vendors who had continually operated such a business there for at least eight years preceding a specific date. The

ordinance was defended on the ground that it was designed to preserve the distinctive charm, character and economic vitality of the French Quarter. Plaintiff, a non-qualifying vendor, argued that this was nonsense because the favored class was based strictly upon years of operation and simply created a monopoly without requiring the favored members to operate in a manner more consistent with the traditions of the Quarter than would any other vendor. This Court did not deny the validity of those arguments, but, nevertheless, held that the City could have rationally justified the ordinance (1) as a partial abolition of push cart vendors, or (2) on the view that newer businesses were less likely to have built up substantial reliance in continued operation in the area, or (3) on the ground that the vendors who had operated for over eight years had themselves become a part of the distinctive character and charm of the French Quarter. The Court said "in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment", *Dukes,* 96 S. Ct. 2516. Further, the Court emphasized that:

> "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. * * * In short, the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in the areas that neither affect fundamental rights nor proceed along suspect lines." (96 S. Ct. 2517).

The appellants' contention in *Pond* v. *Walden* that this case involves "sensitive and fundamental rights and should therefore be subjected to the 'strict scrutiny' test" as stated in *Stanley* v. *Illionis,* (1972), 405 U. S. 645, 92 S. Ct. 1209,

31 L. Ed. 2d 551, is plainly wrong. The rights involved in this case consist of the ownership of speculative mineral interests and the statute does nothing more than impose upon such owners the obligation to keep their ownership current of record when the property is not being used. There is absolutely no basis for elevating the rights in this case to the same level as the parental rights involved in *Stanley* v. *Illinois*.

III. THE STATUTE DOES NOT IMPAIR THE OBLIGATION OF A CONTRACT

The rights which the legislation in the instant case affects are property rights. The protection of the contracts clause is directed toward rights which arise out of executory contracts. If it applies to protect all kinds of property interests on the theory that any property is, or has been, the subject matter of a contract, then the contracts clause duplicates the due process clause in this regard. The two become a single limitation on the power of the legislature to act with respect to wealth. See *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind. L. R. 456 (1979).

It is true that in the past there has been a tendency to assume that similar standards should be used to measure the validity of legislation in the two areas. In both situations it has been held that the prohibition, be it the due process clause with respect to property or the impairment clause with respect to contracts, is not an absolute one. Rather it is one which requires that the interference bear a reasonable relationship to a proper legislative objective.

The mineral claimants contend that two recent decisions of this Court involving the contracts clause have expanded upon this simple test. See *United States Trust*

Co. v. *New Jersey*, (1977), 432 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 92 and *Allied Structural Steel* v. *Spannaus* (1978), 438 U. S. 234, 98 S. Ct. 217, 57 L. Ed. 727. Those cases do nothing more, however, than apply the existing tests to particular situations. In fact, in *Spannaus*, the Court reconciles both cases with existing authority when it quotes from the *United States Trust Co.* case to the effect that:

> "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

In *Spannaus*, this Court simply did not believe that the legislation proceeded in a reasonable manner toward a proper legislative objective. The decision points out many reasons for this conclusion. Among other things, the Court noted that if the objective of the legislation was to secure pension rights to workers, it was unfair and counterproductive to discriminate against employers who had been generous in providing pension rights by imposing unreasonable additional burdens upon them. *United States Trust Co.* v. *New Jersey* is also consistent with prior authority. The State was attempting to escape its own contractual undertaking, and, in such cases, it has always been held that the legislation will be subjected to a closer scrutiny. In I Antieau, *Modern Constitutional Law* 252, it is said:

> "Without accepting any absolutist interpretations of the contract clause, one must agree that the States are held to contractual integrity by the contract clause."

It may be contended that the language of the Court in *Spannaus* and *U. S. Trust Co.*, that:

> "The severity of the impairment measures the height of the hurdle"

has resulted in a new standard for testing the constitutionality of legislation in this area; a standard which results in this Court giving less lattitude to legislatures in the area of economic regulation. Even if that be true and even if it is assumed that this newer and stricter approach is also applicable to questions arising under the due process clause, it does not follow that the act involved in the instant case is invalid because the degree of impairment in the instant case is very slight. In both *Spannaus* and *U. S. Trust Co.*, the impairment was immediate and unavoidable. In neither case could the party who was economically affected by the Act do anything to avoid the impact. In the instant case, the Act gave the affected parties two years after its effective date in which to file a simple document with the recorder of deeds and thereby completely escape the effect of the Act. A statute which gives a party a reasonable time to do an act which is of very little inconvenience to him and thereby escape any economic disadvantages cannot be said to represent a severe impairment of rights. In *El Paso* v. *Simmons*, 379 U. S. 497, 508; 85 S. Ct. 577 (1964) where this Court considered a Texas statute which retroactively terminated the theretofore statutory right to reinstate a forfeited contract to acquire land from the State, this Court said of the contracts clause:

> "Moreover, the 'economic' interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

Since the filing requirement is minimal, it is apparent that whether one speaks of due process or contract impairment, the constitutional standard applicable to the regulation of property rights remains today as formulated

over one hundred fifty years ago in *Jackson* v. *Lamphire*, (1830) 28 U. S. 280. The question was whether New York could pass a law invalidating plaintiff's deed and giving his land to a subsequent purchaser from the same vendor simply because he, a resident of Canada not knowing of the law (and having a deed made prior to its enactment), failed to file a suit to establish his property right within three years. Unschooled as they were in the nuances of due process, the Justices grappled in that case with impairment of contract. Nevertheless, they correctly perceived the role of the Court and of the Constitution in such matters:

> ". . . *there is no contract on the part of the state, that the priority of title shall depend solely on the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered.* It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. *The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment.* . . .

Whether it is considered as an act of limitations, or one in the nature of a recording act, or as a law sui generis, called for by the peculiar situation of that part of the state on which it operates; we are unanimously of opinion, that it is not a law which impairs the obligation of a contract; . . .". [emphasis supplied]

CONCLUSION

The mineral claimants urge this Court to overthrow one hundred fifty years of precedent by grafting a procedural due process requirement on legislation affecting property rights. The implications are far-reaching. Where property such as bank deposits is involved, some form of official notice of regulatory changes is relatively easy since at least the names of depositors and locations of deposits are known. See, for example, *Anderson National Bank* v. *Luckett* (1944) 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692. Such is not the case with regard to land. Determining ownership of interests in land, as well as the whereabouts of the owners, is a tedious and time-consuming process. In the cases at bar, it was the absence of any practical source of information about such facts that prompted the legislation in the first place.

Notice of the law was a necessary presumption even in earlier years when many could not read and few had access even to daily newspaper communication. In today's world where most are literate and all have access to instant communication sources, the validity of the presumption is greater, not less. Persons owning property must still be expected to look after it and attend to the problems incident to its ownership, both legal and otherwise. To require a State to treat property rights as if they were as fundamental as the right of an accused to remain silent or to

trial by jury would indeed place a severe burden and restriction upon the State's power to pursue the public welfare in civil and economic matters.

For these reasons, Appellees submit that in the property sphere a reasonable grace period is and must remain a due process alternative. Its simplicity and effectiveness far outweigh the occasional harm to affected owners. Accordingly, Appellees respectfully request that the decision of the Indiana Supreme Court in the cases at bar be affirmed.

Respectfully submitted,

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Nos. 80-965, 80-1018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-965

TEXACO, INC., et al. - - - - - Appellants

versus

LOUISE F. SHORT - - - - - - Appellee
STATE OF INDIANA - - - - - Intervenor

No. 80-1018

EDEN H. POND, et al. - - - - - Appellants

versus

ULYSSES G. WALDEN, JR., et ux. - - Appellees
LOUISE F. SHORT - - - - - - Intervenor

Appeals from the Supreme Court of Indiana

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Nos. 80-965, 80-1018

No. 80-965

TEXACO, INC., et al - - - - - - *Appellants*

v.

LOUISE F. SHORT - - - - - - - - *Appellee*
STATE OF INDIANA - - - - - - - *Intervenor*

No. 80-1018

EDEN H. POND, et al. - - - - - - *Appellants*

v.

ULYSSES G. WALDEN, JR., et ux. - - - - *Appellees*
LOUISE F. SHORT - - - - - - - *Intervenor*

APPEALS FROM THE SUPREME COURT OF INDIANA

JOINT REPLY BRIEF OF APPELLANTS

Appellees in their Brief attempt to shift the focus of this appeal to an uncontested issue: whether the Indiana Mineral Lapse Act satisfies the minimal requirements of substantive due process—i.e., whether it is rationally related to a legitimate legislative objective. (Appee. Br. 10-14). The reasonableness of the asserted public purpose behind the Indiana Mineral Lapse Act (also referred to as the Indiana Dormant Mineral Act) has not been challenged by us in this appeal. However, what is at issue before the

Court in this appeal is whether the means used in this Legislation to accomplish this policy satisfy constitutional requirements, particularly the procedural requirements of the due process clause. The essential constitutional defect of the Indiana Mineral Lapse Act is that it takes a fee simple real property interest without providing for any antecedent notice or an opportunity to be heard. The Act is designed in such a way as to promote the forfeiture of a valuable real property interest—even taking severed mineral interests from owners who are still very much aware of their ownership, who are living in the area, and who are actively working to develop their interests. (See Statement of Facts in Appellants' Briefs). The Indiana Mineral Lapse Act fails to provide even minimal procedural due process protections of notice and an opportunity to protect the property interest or contest the legitimacy of the taking.

A. APPELLEES MAKE INACCURATE CATEGORIZATIONS IN THE OPENING SECTIONS OF THEIR BRIEF.

In the opening sections of their brief, the Appellees make certain misleading categorizations which must be clarified. First of all, they refer to the Appellants as the "mineral claimants" and the rights involved are referred to as "abandoned mineral claims." As set forth by the Supreme Court of Indiana in its decision in this case, *Short* v. *Texaco,* Juris. St. in *Pond* v. *Walden,* A-4, as a matter of Indiana property law, severed mineral interests are interests in real property, independent of the ownership of the surface, which may be transferred and conveyed in such a manner as all other interests in real estate. Therefore, the Indiana Mineral Lapse Act does not extinguish "mineral

claims," but causes a forfeiture and extinguishment of actual fee simple ownership in real property. Also, as the Statement of Facts in our opening briefs indicate, the owners of the mineral interests have not in fact, or at common law, abandoned their mineral interests. The owners of the mineral interests, Appellants herein, had even begun developing their interests prior to the initiation of the present causes of action.

Secondly, the Appellees assert in their Brief that the severed mineral interests which are being extinguished by the Act are so speculative in nature as to render them of little or no value. However, even when there is little or no information regarding the mineral reserves in the property, the speculative value of the mineral interest is often worth hundreds of dollars per acre. Additionally, when there is geological information indicating substantial reserves, the mineral rights will usually be far more valuable than the surface rights. Furthermore, the number of states which have passed dormant mineral legislation, and the number of lawsuits and appeals that have resulted from this legislation is indicative of the value of the property rights involved. Certainly, this present appeal would not have been brought to this Court if only "worthless" mineral rights were at issue. In any event, constitutional issues are not determined on the quantum of value of property. If the property has been unlawfully taken, it matters not whether it was worth $100.00 per acre or $10,000.00 per acre.

B. APPELLEES FAIL TO DISTINGUISH WHY A DORMANT MINERAL ACT IS NOT A TAKING OF PROPERTY.

Apparently conceding that the Indiana statute must fail as procedurally deficient if its mandated transfer of a mineral estate to the surface owner can accurately be classified as a "taking," Appellees attempt to argue that the Indiana Mineral Lapse Act does not effect a taking of property. Their first contention in this regard is that the Act "is clearly not a taking . . . because it is not a taking for public purposes." (Appee. Br. 15.)

Certainly by this assertion Appellees cannot mean that the Indiana statute is not a device to implement what Indiana regards as a significant public purpose, for on the preceding page of their brief they argue:

> The statute in this case is designed to facilitate the development of Indiana's natural resources—both surface and subsurface. (*Id.* 14).

Moreover, Appellees conclude their substantive due process argument with the contention that "the State is permitted to act in the public interest even though the effect may be to interfere with the liberty or property of individuals. . . ." *Id.* Clearly then, by Appellees' own admission, the Indiana statute, like every statute constituting a taking of property, is designed to serve a "public purpose."

The only other possible interpretation of Appellees' contention that the Indiana statute is not a "taking for public purpose" is that the statute does not require the transfer of property to the State. However, as was demonstrated in Appellants' opening briefs, a statute which directs a transfer of property to a private party or which limits the use of property for the benefit of another, is a taking, just

like a statute that results in the direct transfer of property to the State.[1] (*Pennsylvania Coal Co.* v. *Mahon* (1922), 260 U. S. 393 (beneficiaries of statute were private owners of surface interests); *Regional Rail Reorganization Act Cases* (1974), 419 U. S. 102, 148-55 (transfer of rail properties to "basically a private, not a governmental, enterprise," *id.* at 152—Conrail—could be a taking); *Northern Cheyenne Tribe* v. *Hollowbreast* (1976), 425 U. S. 649; *Berman* v. *Parker* (1954), 348 U. S. 26.

Appellees also argue that the inclusion of a grace period in the Indiana statute saves it from invalidity under the taking clause. They refer to the absence of such a grace period or similar device in the statute struck down by the Court in *Mahon* (Appee. Br. 16),[2] and argue that, since the mineral estate owner is permitted to take action to avoid the operation of the statute, it cannot constitute a taking.

There is no ongoing grace period now applicable under this statute. That phase ended in 1973; the original two-

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[1]The only decision cited by appellees to support their position on this aspect of their argument is *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 135 (1977). Appellees in *Penn Central* argued that the New York City Landmarks Law is "an instance . . . in which government, acting in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose." *Id.* While this Court did not accept that proposition, it went on to articulate a much broader rationale for rejecting the taking argument. Thus, to the extent *Penn Central* is relevant to the public purpose point, it supports appellants' position, since the Court did not find it sufficient to rest its decision on its rejection of the "strictly governmental purpose" argument.

[2]Appellees' reference to a statutory grace period, while irrelevant to an analysis of the takings issue, foreshadows their analogy between the Dormant Mineral Act and statutes of limitation (*see* Appee. Br. 17-19). The shortcomings of any such analogy are discussed at pages 8-9, *infra*, and are covered at length in Appnt. Br., *Pond* v. *Walden*, 34-36.

year period following passage of the Act is over. No grace period now exists. In any event, the original two-year period was of no real consequence except as to owners whose mineral interests had been created at least eighteen years earlier. It cannot be a material consideration now. Surely it cannot be argued that such a one-time opportunity—even assuming that the time period is reasonable—can salvage the constitutionality of an otherwise unconstitutional burden.

As the starting point for their third and final argument against the existence of a taking, Appellees note that in *Penn Central, supra,* the Court stated that "a state statute . . . may so frustrate distinct investment-backed expectations as to amount to a taking." (Appee. Br. 15.) Appellees then suggest that the mineral interests at issue in this case represent only slender "investor-backed expectations," which do not rise to the level of the interests at stake in *Mahon, supra,* and *Goldblatt* v. *Town of Hempstead* (1962), 369 U. S. 590, where deposits of coal and gravel were actually being mined at the time of the taking. (Appee. Br. 16.)

This argument is not only based upon the previously discussed mistaken notion of the significance of the real estate interests at issue in this case but, more importantly, it proceeds from a misreading of the entire field of eminent domain law. The factor identified by the *Penn Central* Court as one of three that may indicate that a taking has occurred does not focus upon the value of "investor-backed expectations," but relates instead to

> [t]he economic impact of the regulation on the claimant and, particularly, *the extent to which the regulation has interfered with* distinct investor-backed expectations. . . ." 438 U. S. at 124 (emphasis added.)

The Indiana statute, of course, interferes totally with such expectations. The size of these "investor-backed expectations," whether huge or relatively insignificant, was of no concern to the *Penn Central* Court.

The law could hardly be otherwise. No court of which we are aware has ever suggested that the protection of the due process clause of the Fourteenth Amendment or of the taking clause of the Fifth Amendment is a function of the price paid for the property taken by the Government or its fair market value at the time of the taking. While these factors, of course, are properly considered in determining the amount of the compensation owed a person whose property has been taken, they never have been considered in determining whether those rights constitute "property" within the meaning of the Fifth and Fourteenth Amendments. Indeed, for the Court to follow the lead suggested by Appellees here and define property interests on this basis would contradict both the Indiana Supreme Court's recognition of mineral interests as valuable property rights deserving of constitutional protection[8] and this Court's holding in *Board of Curators* v. *Horowitz* (1978), 435 U. S. 78, where it recognized that States, not federal courts interpreting the Constitution, have the authority to define the existence of property rights, *Id.* at 82.

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[8]The Indiana Court stated:

"Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership." Juris. St. in *Pond* v. *Walden*, A-4.

C. APPELLEES' ANALOGY TO REMEDIAL ACTS IGNORES THE SIGNIFICANT DIFFERENCES BETWEEN THOSE ACTS AND DORMANT MINERAL LEGISLATION.

Analogizing the Mineral Lapse Act to general statutes of limitation, different forms of marketable title legislation, and the doctrine of abandonment, Appellees next argue that the Indiana statute is so similar to these that it must be constitutionally correct.[4] (Appee. Br. 16-24.) As we have shown in our opening briefs (Appnt. Br. in *Pond* v. *Walden*, 34-38), this argument ignores significant differences between the Indiana statute and the legislation and judicial doctrines relied upon by Appellees.

Appellees place primary emphasis upon decisions of this Court upholding statutes of limitation against constitutional challenges. Statutes of limitation, however, occupy a special, almost unique position in our legal system and do not lay the foundation for generalized and broadly applicable principles of due process and takings law.

As this Court has stated in upholding a statute of limitations:

> The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and

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[4]Appellees' description of 43 U.S.C. § 1744 as a "Dormant Mineral Act pertaining to Federal lands" is inaccurate. (See Appee. Br. 24, n. 7.) Dormant mineral acts like the Indiana statute here under review deprive mineral estate owners of property interests previously created by deed or other instrument. By contrast, the federal statute referred to by Appellees imposes a requirement upon those who assert claims to minerals underlying public lands to register their claims so as to acquire in the first instance an interest in those minerals. The statute does not impose any recording or other requirements to preserve an interest previously created by a deed or other instrument. It is, therefore, wholly dissimilar to the statute now before this Court.

> all law; it existed in a state of nature; and is only modified by society, according to the discretion of each community." *Hawkins* v. *Barney's Lessee,* 30 U. S. (5 Peters) 457, 467 (1831).

This "universal law" is based on society's preference for a state of repose in which the potential claims that can be asserted against its members through the judicial process are certain and known. *Chase Securities Corporation* v. *Donaldson* (1945), 325 U. S. 304. Moreover, statutes of limitation are designed to protect the integrity of the judicial system by placing upon parties the obligation to move in a timely fashion to enforce their claims while witnesses' memories are fresh and documents bearing upon the existence of the claim are still reasonably available. *Id.* at 314. Statutes of Limitation assume unresolved disputes and set maximum time limits for the disputes to be brought to court. Here there are no such disputes except those which the Act in question itself creates.

When seen in this light, statutes of limitation provide no justification for dormant mineral acts. To the contrary, by placing in issue actions of the mineral estate holder over the prior 20-year period, such statutes create controversies that of necessity are difficult to prove because of uncertain memories and missing documents. Dormant mineral acts, far from protecting the integrity of the judicial process, instead create disputes that will be brought to court for adjudication on a stale record.

Appellees also erroneously point to the existence of state marketable title acts to support their arguments. These statutes, however, are designed principally to reduce the transactional costs of property transfers by shortening the period through which the record of title must be searched, and to clear up collateral matters relating to title. They serve a far different purpose than the Mineral

Lapse Act, which seeks to extinguish severed mineral interests by reason of their non-development.

In any event, Appellees' reliance on marketable title acts cannot resolve the procedural due process issues in this case, since this Court has never passed upon the constitutionality of such statutes. That the state courts' acceptance of marketable title acts does not establish the constitutionality of the far different Mineral Lapse Act is illustrated by the fact that the highest courts of three states — Illinois, Minnesota, and Nebraska — which have upheld marketable title acts (*see* Appee. Br. 21-22, 27 N. 9) have subsequently struck down dormant mineral acts.

Finally, state law regarding abandonment of property, which lies at the heart of Louisiana's doctrine of liberative prescription and the California decision of *Gerhard* v. *Stephens* (1968), 68 Cal. 2d 864, 442 P. 2d 692 (*see* Appee. Br. 22-23), does not validate the Indiana Mineral Lapse Act. It should first be pointed out that, contrary to the contentions of Appellees, Indiana is not similar to Louisiana in its classification of mineral interests, in that Indiana classifies many types of mineral interests as corporeal rather than incorporeal. (Appnt. Br. in *Pond* v. *Walden*, p. 14). Statutes and judicial decisions establishing the law of abandonment turn upon an interference, reasonably derived from the unexplained non-use of the property by its owner, that he or she has made it available to another. A conflict develops between two parties claiming ownership of the property, which can only be resolved by judicial decree. Dormant mineral legislation, by retroactive criteria, takes property in which there was no previous conflict as to ownership. As shown by the present cases, the surface owners would have no claim to ownership of the mineral rights but for the Indiana Mineral Lapse Act. In any event, abandonment is a state law rule

and neither Indiana nor any other state has upheld dormant mineral legislation on an abandonment theory. It is clear that—as pointed out by Appellees in their Brief (Appee. Br., 5)—as a matter of Indiana law, a mineral estate cannot be lost by abandonment, and this statute cannot be saved by an abandonment theory.

D. APPELLEES' CATEGORIZATION OF THE INDIANA MINERAL LAPSE ACT AS BEING SELF-EXECUTING DOES NOT MAKE IT CONSTITUTIONAL.

In contending that the retroactivity of the Indiana Mineral Lapse Act does not violate the Due Process Clause, Appellees refer to the self-executing nature of the statute (Appee. Br. 28-33) and contend that to require notice and a hearing in this case before permitting the extinguishment of the mineral interest owners' rights would be "contrary to several centuries of Anglo-American legal tradition." (*Id.* at 29.)

Appellees principally rely, as did the Indiana Supreme Court, upon four decisions of this Court that dealt only with statutes of limitation.[5] Of course, by their very nature statutes of limitation must be self-executing. The type of prior notice which we urge as a constitutional prerequisite for dormant mineral acts would be unthinkable in a statute of limitation context—*e.g.*, a potential defendant's notice to a plaintiff that a claim, which the plaintiff might not even know he possesses, must be asserted within the statutory period or be forever lost. The litigation-inducing

[5] *Hawkins* v. *Barney's Lessee* (1831), 30 U. S. (5 Peters) 457; *Terry* v. *Anderson* (1877), 95 U. S. 628; *Turner* v. *New York* (1897), 168 U. S. 90 (evidentiary presumption construed by state court to create statutory period of limitation); *Wilson* v. *Iseminger* (1902), 185 U. S. 55.

consequences of such a rule explain its absence from the law.

In standing upon "centuries" of "legal tradition" in other unidentified areas of law, Appellees probably have in mind the self-executing statute that deals with the regulation of conduct. It is, of course, a truism that "ignorance of the law is no defense," so that if a person intends the natural and ordinary consequences of his actions he or she can be held civilly or criminally liable even if it cannot be demonstrated that defendant had prior notice of the law's requirements. However, before a specific statute can be applied to a specific person, that person must be given notice and an opportunity for a hearing. Following the criminal law analogy, while it is true that "ignorance of the law is no defense," it is still necessary to notify the accused of the particulars of the crime committed and have a trial in compliance with due process requirements, regarding the guilt of the accused.

Moreover, there have been "centuries" of law developed under the Constitution mandating notice and an opportunity to be heard prior to the application of a statute which, like a dormant mineral act, purports to take property and give it to another. *See Ochoa* v. *Hernandez y Morales* (1913), 230 U. S. 139, 161. Appellees have cited no self-executing statute operating like a dormant mineral act that has ever been upheld.

Even more glaringly, Appellees have failed to explain the Court's holdings in the escheat cases[6] discussed in the opening brief. (*See* Appnt. Br. in *Pond* v. *Walden*, 24-25). These cases establish that notice and an opportunity to appear, be heard, and declare an interest in dormant prop-

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[6]*Standard Oil Co.* v. *New Jersey* (1951), 341 U. S. 428; *Anderson National Bank* v. *Luckett* (1944), 321 U. S. 233; *Security Savings Bank* v. *State of California* (1923), 263 U. S. 282.

erty must precede the transfer to the State of title to bank accounts, accounts receivable and other personal property.

In their attempt to discredit these cases, Appellees assert that the escheat cases should not apply because it is easier to provide notice to bank account holders than owners of mineral estates. (Appee. Br., 48.)[7] *Mullane* v. *Central Hanover Bank & Trust Co.* (1950), 339 U. S. 306, of course, provides the simple answer to this contention: notice of the transfer of title need not be personal but may be by publication where owners are unidentifiable or unlocatable.

As we have noted in our initial briefs, the highest courts of six states have recently reviewed the constitutionality of dormant mineral legislation, and in four instances have struck down such statutes. (Appnt. Br. in *Pond* v. *Walden*, 9-11.) Appellees claim to find support for the decision below in the decisions of three other state supreme courts. (Appee. Br. 34-37.) Two of the three decisions relied upon by Appellees, however, provide no support for their position.

In *Nelson* v. *Bloodworth* (1977), 238 Ga. 264, 232 S. E. 2d 547, the Georgia Supreme Court reviewed a mineral statute that purported to allow a surface owner to acquire title to mineral interests by adverse possession after seven

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[7]This argument is repeated elsewhere where appellees state that a hearing procedure will raise intractable factual issues and will make it difficult or impossible for Indiana to achieve its goal of encouraging mineral development. Appee. Br. 7, 33. In fact, the opposite is true. The notice and hearing procedure urged here would permit the entry of a judgment that would finally and conclusively determine the factual issues raised by a dormant mineral act. Future development of mineral interests, therefore, will be made less complex by satisfying the requirements of due process, not more so.

years of non-use and non-payment of taxes. The holding of the Court, absent citations, follows in its entirety:

> As we read the 1975 act, although it became effective July 1, 1975, suit based on the act cannot be commenced until at least seven years from that date. . . . Plaintiff's action being at least premature, the trial court did not err in denying the relief sought. 232 S. E. 2d at 549.

The Virginia decision cited by Appellees, *Love* v. *Lynchburg National Bank & Trust Co.* (1965), 205 Va. 860, 140 S. E. 2d 650, is also irrelevant. The dormant mineral legislation in that case provided for the transfer of dormant mineral interests to the surface owner only after an action has been commenced (as to which notice is given to the mineral interest owner). In addition, the mineral estate owner must be afforded a period of not less than six months from the commencement of the suit, during which time he or she has the opportunity of demonstrating that valuable minerals are in fact located on the property. Only after no minerals are shown to exist does the Virginia statute permit judgment transferring title to the mineral interests to the surface owner. As the court held, the statute "was not intended to destroy or impair any ownership in existing property," 140 S. E. 2d at 653, since "if there are no minerals, there can be no mineral rights" *id.* The Indiana statute clearly lacks both the procedural and substantive safeguards provided in the Virginia act to ensure that no property is taken or property rights impaired.

E. THERE ARE CONSTITUTIONAL MECHANISMS AVAILABLE TO STATE LEGISLATURES TO ACHIEVE THE SAME ENDS AS THE INDIANA MINERAL LAPSE ACT.

Appellees argue in their brief that it would be impractical to provide due process notice and hearing prior to the extinguishment of the mineral interest. Granted, it may not be as expedient to provide notice and a hearing prior to the extinguishment of the severed mineral interest. However, as noted by Judge Walter H. Palmer, the trial judge in the present cases who declared the Indiana Mineral Lapse Act unconstitutional, "Expediency is not always justice whether the end sought is laudable or not." (J.A., *Pond* v. *Walden*, p. 35). The burden of providing notice and a hearing prior to the extinguishment of the mineral interest is slight in comparison to the value of that real property interest affected and the harm caused to the owner of that property interest.

Additionally, other jurisdictions have shown that it is possible to design dormant mineral legislation, or other types of legislation calculated to achieve the same ends, which provides notice and a hearing in conformity with procedural due process requirements. The Minnesota Dormant Mineral Act—which was declared unconstitutional by the Minnesota Supreme Court in *Contos* v. *Herbst* (Minn. 1979), 278 N. W. 2d 732—provided that the owner of a severed mineral interest must file a verified statement of ownership with the register of deeds and pay a yearly tax in order to avoid forfeiture to the state. The Minnesota Act also had an escheat provision providing that the owner of the severed mineral interest would be compensated for the taking. However, the Minnesota Act was held constitutionally defective because there was no requirement in

the Act requiring notice and a hearing to the owner of the interest prior to the forfeiture. The Act was subsequently amended by the Minnesota legislature in 1979, Minn. Stat. Ann. § 93.55(1), to require notice and a hearing prior to the forfeiture, and this presumably would satisfy the requirements of procedural due process as outlined by the Minnesota Supreme Court in the *Contos* decision and argued by us in this appeal.

As noted in our initial Brief, the Illinois Supreme Court in the case of *Wilson* v. *Bishop* (1980), 82 Ill. 2d 364, 412 N. E. 2d 522, held the Illinois Dormant Mineral Act to be unconstitutional. Recently, the Illinois legislature passed Senate Bill No. 591, which bill is presently awaiting the signature of the Governor of Illinois to become law. This legislation provides a mechanism for leasing oil and gas interests of owners who cannot be located. The Illinois Act sets forth that if one makes a good faith effort to locate the owner of an oil and gas interest, and he or she cannot be found, a Complaint may be filed with the county court in which the oil and gas interest is located requesting the right to lease the oil and gas interest. After notice by publication to the missing owner, the court appoints a trustee to act as agent for the missing owner. The trustee then negotiates an oil and gas lease on behalf of the missing owner, with the royalties obtained pursuant to the lease being held in escrow on behalf of the missing owner.

The Minnesota and Illinois statutes clearly indicate that there are other mechanisms available for achieving the same ends as the Indiana Mineral Lapse Act, but which comply with procedural due process requirements.

F. THE CLASSIFICATION CONTAINED IN THE INDIANA MINERAL LAPSE ACT VIOLATES THE EQUAL PROTECTION CLAUSE.

The Appellees argue in their brief that the exception to the filing requirements contained in Indiana Code 32-5-11-5 —requiring that notice be given to certain owners of multiple severed mineral interests—does not affect a sensitive and fundamental right which would require strict scrutiny. However, the Indiana Mineral Lapse Act creates a classification which mandates that procedural due process notice be given to a special interest group while denying similar due process notice protection to all others. When a state statutory classification approaches such sensitive and fundamental rights—such as procedural due process notice—strict scrutiny is the standard used to examine such legislation. *Tremble* v. *Gordon* (1977), 430 U. S. 762.

The Appellees oversimplify the distinction between the present case and *Stanley* v. *Illinois* (1972), 405 U. S. 645, by labeling *Stanley* a parental rights case and the present appeal a mineral interest case. This Court stated in *Stanley* on 405 U. S. 649:

> We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending to all other parents whose custody of their children is challenged, the state denied Stanley the equal protection of the laws granted by the 14th Amendment.

As in *Stanley*, the Indiana Mineral Lapse Act grants due process protection to one class while denying such due process protection to others who are in similar need of protection.

Appellees argue in their brief (Appee. Br. 39-44), that the classification is merely an economic one and therefore must only avoid being arbitrary and capricious to satisfy the equal protection clause. But even under this low scrutiny test, the Indiana Mineral Lapse Act must fail. The Indiana Mineral Lapse Act creates a classification which protects a special interest group which has less need of protection than the much larger group which is not offered such protection. The owners of multiple severed mineral interests in a county are far more likely to be aware of legislation affecting their interests than small mineral interest owners who typically do not have the personnel, time, or financial ability to keep abreast of such legislation. The Indiana Mineral Lapse Act is arbitrary and capricious in that it provides protection to the very class of persons who least need protecting Thus, even applying a low level scrutiny test of the equal protection clause, the Indiana Mineral Lapse Act must fail.

G. CONTRARY TO APPELLEES' CONTENTIONS, THE INDIANA MINERAL LAPSE ACT CREATES A SEVERE IMPAIRMENT ON A CONTRACT.

The Appellees argue in their brief that the modern contract clause test as set forth by this Court in *Allied Structural Steel* v. *Spannaus* (1978), 438 U. S. 234, does not apply to the present cases because the Indiana Mineral Lapse Act does not create a severe impairment on a contract. The Appellees argue that the two year grace period for recording a statement of claim with the County Recorder imposes only a slight impairment on the contract. However, the Appellees again ignore the severity of the consequences of failure to file the statement of claim—that being the complete destruction of the contractual rights

created by the severance instrument. It is this impairment which sets the height of the hurdle which the state legislation must clear. *Spannaus, supra,* 438 U. S. at 244-245. Appellees apparently concede in their brief that if the *Spannaus* test applies, and this Court finds a severe impairment of contract, the Indiana Mineral Lapse Act could not be justified by examining the necessity or the nature and purpose of such legislation. Given then the severity of the impairment, the Indiana Mineral Lapse Act fails to provide the protection required by the Contract clause of the U. S. Constitution.

CONCLUSION

Having addressed and refuted each of the arguments advanced by Appellees in support of the decision below, we reiterate the position which we have taken in our principal briefs: Our attack here is upon the procedural aspects of dormant mineral legislation that operates, like the Indiana statute, without any notice or opportunity for hearing prior to the divesting of a clearly recognized property right.

We do not make a substantive due process challenge to the statute nor assert in this Court any quarrel with the policies which Indiana seeks to serve. We do contend that those policies must be carried out in a manner that comports with the basic concepts of fairness embodied in the due process of law requirement of the Fourteenth Amendment, as it stands on its footing and as it incorporates the taking clause of the Fifth Amendment. At a minimum, this requires that the best possible notice under the circumstances be given to a mineral estate holder prior to an administrative or judicial proceeding which would accord finality in transferring his or her property to a surface owner.

Appellees resort to the argument that it would be "impracticable" to extend constitutional rights of notice and hearing to this case is indefensible. At a time when this Court has required notice of informal administrative action to apprise an individual of the interruption of his utility service,[8] the revocation of a driver's license,[9] the termination of social security payments,[10] and the like, it cannot be plausibly contended that it is impracticable to give constitutional notice prior to the destruction of title to a valuable real property estate.

For the reasons set forth in this brief and the initial briefs of Appellants, it is respectfully requested that the Indiana Mineral Lapse Act be declared unconstitutional and null and void insofar as it pertains to the Appellants, and that the decision of the Indiana Supreme Court be reversed.

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[8] *Memphis Light, Gas, and Water Div.* v. *Craft* (1978), 436 U. S. 1.

[9] *Bell* v. *Burson* (1971), 402 U. S. 535.

[10] *Goldberg* v. *Kelly* (1970), 397 U. S. 254.

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NOS. 80-965 and 80-1018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TEXACO, INC., ET. AL. ..... APPELLANTS

versus

LOUISE F. SHORT, ET. AL. ..... APPELLEES

EDEN H. POND, ET. AL. ..... APPELLANTS

versus

ULYSSES G. WALDEN, JR., ET. AL. ..... APPELLEES

On Appeal from the Supreme Court of Indiana

MOTION TO FILE AND BRIEF OF AMICUS CURIAE FOR SAVE OUR CUMBERLAND MOUNTAINS, INC., THE DAVID COMMUNITY DEVELOPMENT CORPORATION, INC., AND THE CONCERNED CITIZENS OF MARTIN COUNTY, INC.

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MOTION TO FILE AMICUS CURIAE BRIEF

Save Our Cumberland Mountains, Inc., the David Community Development Corporation, Inc., and the Concerned Citizens of Martin County, Inc., hereby move this Court for permission to file a joint amicus curiae brief pursuant to Supreme Court Rule 36.3 and state as reasons the following:

1. Save Our Cumberland Mountains, Inc. (hereinafter "SOCM") is a not-for-profit corporation organized under the laws of Tennessee. It is a group comprised of about 600 families, many of whom live in the Tennessee coal fields of the Cumberland Mountains and Cumberland Plateau of Tennessee. Several SOCM members are surface owners who have had difficulty obtaining home loans because of severed mineral interests which have been abandoned by mineral owners who are hard to identify and locate.

The David Community Development Corporation, Inc. (hereinafter "DCDC") is a non-profit corporation organized under the laws of Kentucky. Its members live in the community of David, Floyd County, Kentucky. Movant DCDC owns approximately 800 acres of surface rights. The DCDC is unable to properly develop substantial tracts of this acreage for low-income housing because of the severed and separate ownership of the mineral estate underlying it.

The Concerned Citizens of Martin County, Inc. (hereinafter "CCMC") is a non-profit corporation, also organized under the laws of Kentucky. The CCMC has been active in taxation issues, particularly as they relate to the welfare of Martin County, Kentucky and the lack of public services available in the county, in large part due to the low tax base. CCMC believes the low tax base is attributable in large part to the severance of the surface and mineral estates.

2. On May 13, 1981, letters were sent to all parties requesting consent to file this brief.[1] On May 20, 1981 a similar letter was sent to the intervenors, the State of Indiana. Consent was refused by Hon. James M. Buthod, Attorney, on behalf of appellants Eden H. Pond, Edna H. Bobe and Consolidation Coal Company in No. 80-1018 Case in a letter dated May 18, 1981.[2]

The three Petitioners herein are vitally interested, from the perspective of surface owners in

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1. Letters seeking consent to file an Amicus Curiae Brief were sent to all parties by SOCM. The DCDC and CCMC did not send separate requests, anticipating similar responses.

2. Consent was granted by Hon. Vern P. Partenkeiner, Jr. and Hon. Ronald W. Polston, attorneys for the appellees. Consent was also granted to Hon. David A. Miller, Deputy Attorney General for the State of Indiana.

Consent was not granted by Mr. Buthod and Hon. Charles R. Nixon, attorneys for the appellants.

and residents of the Southern Appalachian Region, in litigation involving challenges to the validity of state legislation regulating the relationship between surface and mineral owners, particularly when, as here, that legislation is challenged on federal constitutional grounds and the result will affect all states including Tennessee and Kentucky and the Appalachian Region.

The three Petitioners herein will emphasize in their brief the interest of states in regulating the relationship between surface owners and owners of subjacent mineral estates. In this context, they believe that the facts of the relationship between surface and mineral owners in the Southern Appalachian areas as presented in their brief are important to the Court's consideration and determination of this case. The history of the broad-form or long-form deed, traditionally used to sever mineral ownership in Kentucky and Tennessee and the situation of surface owners who want to develop their land when severed mineral estates have been abandoned will be discussed for the Court.

Virtually every state in the coal fields has attempted to adjust this relationship to provide greater equities to surface owners as Indiana has done in this case.

5. Some members of SOCM have tried to improve their homes. These members own only the surface rights, but are unable to obtain loans

because of severed, mineral ownership. The DCDC has attempted to develop an apartment complex on its surface lands, but because an absentee owner owns the mineral rights, the DCDC's efforts to obtain a construction loan collapsed. Because there are large numbers of severed mineral estates in the coal fields of East Kentucky and Tennessee, the two groups strongly believe these cases are typical of other situations and believe these facts should be before the Court in this case.

6. The CCMC are concerned with the relationship between the minimal levels of taxes paid by corporations and individuals and the poor quality of public services available in the Eastern Kentucky and Tennessee regions. Because the result of the Indiana case will affect similar legislative efforts in other states, the CCMC believes that the Court should consider this relationship as well.

WHEREFORE, Save Our Cumberland Mountains, Inc., the David Community Development Corporation, Inc., and the Concerned Citizens of Martin County, Inc. move this Court for permission to file an amicus curiae brief in the two above-styled consolidated cases and for any other appropriate relief.

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INTEREST OF THE AMICUS CURIAE

The David Community Development Corporation, Inc. (DCDC) is a nonprofit corporation organized under the laws of Kentucky. The DCDC purchased 800 acres of surface rights in the

community of David, Floyd County, Kentucky in 1975. The DCDC has been developing this land for low-income housing. Because the minerals underlying this surface are owned by many absentee owners, the DCDC has been hindered in its attempts to develop the land and it is, therefore, concerned about its rights as surface owners.

Save Our Cumberland Mountains, Inc. (SOCM) is a nonprofit corporation organized under the laws of Tennessee, comprised of approximately 600 member families residing in the East Tennessee coal fields. Several SOCM members who are surface owners have had difficulty in obtaining home loans because of abandoned mineral interests clouding their titles. Accordingly, SOCM is concerned about the rights of surface owners and the relationship between those rights and the rights of mineral owners.

The Concerned Citizens of Martin County, Inc. (CCMC) is a nonprofit corporation organized under the laws of Kentucky. The CCMC is comprised of members residing in Martin County, Kentucky. The CCMC has been particularly concerned with tax issues, as they relate to the lack of services in Martin County and Eastern Kentucky. CCMC feels that the absentee ownership of large tracts of minerals in Martin County, has contributed to the low tax base in the county and the lack of public services available to the county's residents.

We agree with the arguments of the appellees and wish to add some additional considerations. All three groups assert their interest as surface holders in this litigation involving a challenge to the validity of state legislation regulating the relationship between surface and mineral owners. The outcome of this litigation will have important consequences to all states seeking solutions to the impediments of abandoned severed mineral estates to the further development of the surface above these mineral interests.

SUMMARY OF ARGUMENT

The Indiana Mineral Lapse Statute[1] is a reasonable attempt to adjust the relationship

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1. Ind. Code § 32-5-11-1, *et seq.* (1980).

between surface and mineral owners. Most mineral rights in the Appalachian coal fields derive from "broad-form" or long-form deeds which gave the mineral owner great power to develop and control the mineral and surface rights.

The conflicts arising from this severance have caused many legislatures in the coal fields to attempt to adjust this relationship. The Supreme Court of all such states dealing with this problem (except Kentucky) have permitted reasonable adjustments considering the long-standing problems between mineral and surface owners.

The statute in question herein is a reasonable attempt to permit surface owners to develop abandoned mineral lands, not only for the extraction of coal, but for other purposes, such as the development or improvement of housing. The lack of adequate housing stocks has been a chronic problem in Eastern Kentucky. Two of the *amicus curiae* herein have been thwarted in their attempt to so develop their surface rights because of the absentee ownership of the severed mineral estate.

The requirement that a mineral owner can protect his interest by filing a statement of claim[2] is a reasonable attempt to induce absentee severed mineral owners to reveal their identities to surface

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2. *Id.*, § 32-5-11-7.

owners who wish to develop the land. Surface owners can then contact mineral owners to purchase the rights or obtain consent to develop. Unknown severed mineral ownership itself has been a detriment to development.

The provision of the statute that protects mineral owners who pay taxes[3] is an inducement for all mineral owners to pay property taxes. The low tax base in Eastern Kentucky and Tennessee has meant that public services in the region are far below average. By making all such "dormant" mineral lands lapse to surface owners, the surface owner can develop the land in a way that will increase the tax base and facilitate new and better public services.

Finally, the surface owner who pays taxes on a tract and maintains the property during a mineral owner's long-standing absence can be determined to be the owner of the entire tract. The surface owner, who shows sole interest in the land for over twenty years, can be entitled under State law to sole ownership.

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3. *Id.*, § 32-5-11-3, defines "use" of minerals, in part, as ". . . when taxes are paid on such mineral interest by the owner thereof."

ARGUMENT

I. INTRODUCTION.

The Indiana Mineral Lapse Statute does little to affect the surface owner-mineral owner relationship. It provides that if mineral owners do not use the property for 20 years, the property lapses to the surface owner.[4] "Use" under the law includes the payment of property taxes by the mineral owner.[5] Further, a mineral owner can protect this interest by filing a statement of claim; this statement can be filed within 2 years of enactment of the legislation or 20 years of non-"use" of the mineral rights, whichever is greater.[6] Clearly, any of these actions that the state requires of mineral owners to protect their interests are minimal.

The Indiana Mineral Lapse Statute is an attempt by that state to regulate the relationship between surface and mineral owners of severed lands. Long standing problems arising from this relationship in the Eastern coal fields have given states important interests concerning this relationship.

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4. Id., §32-5-11-1.

5. Id., §32-5-11-3.

6. Id., §32-5-11-7.

Coal fields have long been one of Appalachia's richest resources, producing energy for the region and the nation, and presenting the potential for significant numbers of jobs. How we manage this great natural resource and how we decide to order the social relationship surrounding it have always been important issues for Appalachia, issues with serious impact on the general welfare. Now, in a time when the pressure on all energy sources is so intense, the need for wise and socially responsible handling of regional coal reserves and for the just resolution of disputes among those affected by the development of those reserves has become more crucial than ever.

From an early date, Tennessee and Kentucky courts recognized the legal existence of severed estates, estates in which title to some or all of the minerals connected with a tract of land could be vested in one person, while title to the surface could be vested independently in another. *See for example, Murray* v. *Allred,* 43 S.W. 355, 100 Tenn. 100, 119-20 (1897) These kinds of estates proliferated all over the Appalachian coal fields, as national industrial interests began to realize the extent of coal deposits in the region. Some of the severing instruments were relatively cryptic about what rights the mineral owner possessed. *See, e.g., Campbell* v. *Campbell,* 199 S.W.2d 931, 29 Tenn. App. 651 (1946), *cert. denied* (1947). Others

contained extensive waiver of damages clauses, which sometimes extended for pages. This latter type of conveyance came to be commonly known as the "broad form deed." See example in Appendix, at 1a-3a. Such a deed was a sweeping document, usually drafted by a large coal or land-holding company, which subordinates the surface estate in land almost completely to the mineral estate. Also called the long form deed, because of its length and complexity, the broad form deed in general purports to confer on the holder of the mineral estate the right to use the surface state in any way necessary and convenient for the recovery of the minerals. In the vast majority of these deeds, the grantor-surface owner reserved the right to use his land for all purposes not inconsistent with the rights granted the mineral holder. Notably, the intention of the parties aside, the right to recover the minerals by strip mining and therefore destroy the surface estate is not expressly mentioned in the broad form deed. Relying on the explanation and representations of the buyers agent, illiterate grantors frequently acknowledged these broad form deeds by the wavering "X". *See, e.g., Woolums* v. *Horsley*, 93 Ky. 582, 20 S.W. 781 (1892) (where the mineral interests were acquired for 40 cents per acre); Note, Broad Form Deed - Obstacle to Peaceful Coexistence

Between Mineral and Surface Owners, 60 Ky. L.J. 742 (1972).[7]

The agents for the land and coal companies did their jobs well. By conservative estimate, title to the minerals underlying some ninety percent of the land in the Kentucky counties of Bell, Harlan, Letcher, Perry, Knott, Pike, and Floyd is severed from the general surface by broad form deeds. A lesser percentage of the land is similarly affected in Knox, Whitley, McCreary, Leslie, Lawrence, and Morgan counties in eastern Kentucky and a few counties in western Kentucky.

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7. "When the highland couple sat down at the kitchen table to sign the deed their guest had brought to them they were at an astounding disadvantage. On one side of the rude table sat an astute trader, more often than not a graduate of a fine college and a man experienced in the larger business world. He was thoroughly aware of the implications of the transaction and of the immense wealth which he was in the process of acquiring. Across the table on the puncheon bench sat a man and woman out of a different age. Still remarkably close to the frontier of a century before, neither of them possessed more than the rudiments of an education. Hardly more than 25 percent of such mineral deeds were signed by grantors who could so much as scrawl their names. Most of them "touched the pen and made their mark," in the form of a spidery X, in the presence of witnesses whom the agent had thoughtfully brought along. Usually the agent was the notary public, but sometimes he brought one from the county seat. Unable to read the instrument or able to read it only with much uncertainty the sellers relied upon the agent for an explanation of its contents - contents which were to prove deadly to the welfare of generations of mountaineers' descendants." H. Caudill, Night Comes to the Cumberlands, 73-74 (1962).

A 1980 study reveals that, of 11 Tennessee coal producing counties researched, minerals were severed from an average 11.9% of total county acreage. The percent of these counties range from 3.01 to 31.56.[8] See Appendix at 4a.

Over the years, many legal disputes arose in Tennessee, Kentucky and elsewhere between surface owners and mineral owners as to their respective rights. The execution of a deed that severed a piece of real property was, on the one hand (like any other conveyance), the completion of an agreement between the parties, the consummation of a contract. On the other, it was also, unavoidably, the beginning of a new and on-going relationship. The surface owner and mineral owner became very special kinds of neighbors, neighbors whose rights and interests in their respective pieces of real property were more intimately intertwined and interdependent than almost any the law had seen before. Throughout this century Courts and legislatures have been devising rules and guidelines to order this relationship and to adjust the rights of the parties involved.

Currently, Kentucky and Tennessee courts follow the common law rule of adverse possession of minerals. This rule requires actual mining or related

8. 5 Appalachiar Land Ownership Task Force, Appalachian Land Ownership Study, at 11 (1980) (as submitted to the Appalachian Regional Commission).

activities for the statutory period to constitute actual, open, notorious, continuous, and hostile possession. "Mere possession of the surface will not give title to the minerals by adverse possession." *Vorhes* v. *Dennison,* 300 Ky. 427, 189 SW2d 269, 271, (1945). Accord, *Northcut* v. *Church,* 135 Tenn. 541 188 SW 220 (1916).

Specifically, under the present adverse possession law in Tennessee and Kentucky described above, it is impractical, and sometimes impossible for surface owners to reunite subjacent abandoned mineral interests with their surface. Thus, the nature of a mineral estate is such that once it is severed, that severance is perpetual whether or not mining activity takes place on the property, or taxes paid. This creates a perpetual cloud on the title of the surface owner even when the minerals have already been mined out.

Moreover, a surface owner is only a third party to any conveyance of the minerals. As a result, he may have no idea who, if anyone, holds a valid claim to minerals under his land and by implication, to the easement over the surface necessary to extract them.

The usual and customary methods of mining coal at the time most broad form deeds were entered into were shaft and tunnel mining. As the technology of strip-mining developed, the potential disruption of the surface increased dramatically,

beyond anything known to or even imagined by the parties who signed the deeds.

Surface owners often found their surface strip-mined with a technology and ferocity unknown to the parties when the mineral rights were severed. Mineral owners could destroy the surface owners home during mining and then return years later to repeat this process. Surface owners of a mined out tract could not develop the surface safely because mineral owners could use their easements to build massive haul roads to destroy any surface development.[9]

> "But technology advanced. The steam shovel grew into a mighty mechanism and was replaced by gasoline and diesel-powered successors. "Dozers" and other efficient excavators were perfected. Ever cheaper and safer explosives came from the laboratories. These marvelous new tools enabled men to change the earth, abolishing its natural features and reshaping them as whim or necessity might require . . ."

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9. See, H. Caudill, *Night Comes to the Cumberlands, supra,* at 305-318. See also, Justice Douglas' comments in *Watson* v. *Kenlick Coal Company, Inc. et al,* 422 U.S. 1012, 95 S.Ct. 2639, 45 L.Ed. 2d 677 (1975). (Douglas, J., dissenting from denial of certiorari) "This case is unfortunately no more than a mere footnote in the continuing tragedy of environmental and human dispoliation:. The rape of Appalachia for its precious coal has been a dark and dismal chapter in our nation's history. . . ." Id, at 1013, 95 S.Ct., at 2639.

> "Next came rulings which gave the companies the power to "divert and pollute" all water "in or on" the lands. With impunity they could kill the fish in the streams, render the water in the farmer's well unpotable and, by corrupting the stream from which his livestock drank, compel him to get rid of his milk cows and other beasts. They were authorized to pile mining refuse wherever they desired, even if the chosen sites destroyed the homes of farmers and bestowed no substantial advantage on the corporation." H. Caudill, *Night Comes to the Cumberlands, supra,* at 306.

II. STATES HAVE LEGITIMATE INTERESTS IN REGULATING THE RELATIONSHIP BETWEEN SURFACE AND MINERAL OWNERS.

As effects of the mining industry on the land, the people, and the overall environment became more pronounced, conflicts between surface owners and mineral owners became increasingly prevalent. Suface owners resorted to state courts asking them to interpret deeds according to the intent of the parties at the time of signing, arguing that the grantor could have granted the extensive disruption of surface caused by strip-mining when the technology was unknown at the time the deed was executed.

However, in most states, courts and legislatures have attempted to solve the problem of destruction of the rights of surface owners. Most courts dealing

with this problem have said regulating this relationship is clearly within the domain of the state.

The Ohio Supreme Court aptly expressed the quandry facing the state judiciaries in cases of this kind when it said:

> [It is] a valid assumption that strip-mining for coal is a more modern technologically advanced method to provide the mineral estate owner a fuller enjoyment of his property. Yet, we cannot ignore the additional fact that strip-mining, although similar to deep mining in so far as both represent a means to a legitimate end, necessarily and unavoidably causes total disruption of the surface estate. Time honored rules of law, meant to insure the mutual enjoyment of severed mineral and surface estates, cannot be blindly applied to resolve a question involving the right to strip-mine. This is true, not because those rules lack present vitality, but because they are dependent upon assumptions wholly irrelevant to strip-mining. *Skivolocki* v. *East Ohio Gas Company*, 38 Ohio St. 2d 244, 249, 313 N.E.2d 374, 377 (1974).

As a result of these inadequacies of prior rules, state courts throughout the coal fields began trying to adjust their legal doctrines to take account of the drastically changed circumstances in the coal industry and began groping for some way to protect the legitimate interests of *both* parties.

In a number of cases, courts ruled that the intent of the parties at the time of the conveyance was key and that the various circumstances surrounding execution of a deed should be examined for their bearing upon that intent. As the practice of strip-mining has grown and spread, a distinct trend has emerged in the case law to the effect that an intent to allow strip-mining cannot be presumed under certain deeds, especially deeds that predated the advent of strip-mining. See *Phipps* v. *Leftwich*, 216 Va. 706, 222 S.E.2d 536 (1976)[10]; *Skivolocki* v. *East Ohio Gas Co.*, 313 N.E.2d 374, 39 Ohio St. 2d 244 (1974); *Stewart* v. *Chernicky*, 439 Pa. 43, 266 A.2d 259 (1970); *Wilkes-Barre Township School District* v. *Corgan*, 403 Pa. 383, 170 A.2d 97 (1961). Conversely, when strip-mining was the clearly predominant method of mining coal at the date of severance, the North Dakota Supreme Court had no trouble upholding the mineral owner's right to strip-mine on that basis. *Christman* v. *Emineth*, 212 N.W.2d 543 (N.D. S.Ct. 1973), Annot. 70 A.L.R. 3d 366 (1976).

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10. Kentucky courts, alone in the country, consistently rebuffed the claims of surface owners who, at minimum sought compensation for destruction of their homes and land. *See, e.g., Buchanan* v. *Watson*, 290 SW2d 40 (Ky. 1956); *Martin* v. *Kentucky Oak Mining Co.*, 429 SW2d 395 (Ky. Ct. App. 1968) (1905. broad form deed: court held mineral owners' implied easement, to use surface necessary to extract minerals allowed complete destruction of the surface by strip-mining, if not done wantonly or willfully.)

Earlier this year, the Tennessee Supreme Court upheld against constitutional challenge the Tennessee Surface Owner Protection Act of 1977. *Doochin* v. *Rackley*, Tenn., 610 SW2d 715 (1981); Tenn. Code Ann. §§64-511, 59-8-308k (Supp. 1980). The purpose of this act was to achieve statutory clarity of the respective rights of surface and mineral owners when those interests are severed. The Act sets up a presumption that the intention of the parties signing any mineral severance instrument, was that "the minerals be extracted only in the principal manner and method of mineral extraction prevailing in Tennessee at the time the instrument was executed." Tenn. Code Ann. §64-511.

In *National League of Cities* v. *Usery*, 426 US, 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976), this Court held that a federal statute regulating wages of state employees was unconstitutional because it "operate[d] to directly displace the State's freedom to structure integral operations in areas of traditional government functions." *Id*, at 852, 96 S. Ct., at 2474. This Court, while applying the federal rules of evidence in a federal criminal prosecution of a state senator who claimed an evidentiary privilege under state law, said that "legislation which directly regulates the internal functions of States" clashed with *National League of Cities, supra. United States* v. *Gillock*, 445 U.S. 222, 100 S. Ct. 1185, 1192, - L.Ed.2d - , (1980).

It is clear in the cases discussed above that states have a particular interest in and ability to design the regulation of the special relationship between surface and mineral owners. Another set of problems from that discussed above arising from this special relationship is addressed by the Indiana Mineral Lapse Statute and similar statutes: the difficulty and sometimes the impossibility of development by surface owner, whether for mineral production or other uses such as residential or industrial, created by the apparent abandonment or extended non-use of the mineral interests. (See U.S. Const. amend. X, which says:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people".)

III. MINERAL OWNERS WHO ABANDON THEIR INTEREST CAN DERIVE STATE AND LOCAL GOVERNMENT OF REVENUES FOR ESSENTIAL PUBLIC SERVICES.

The Indiana Statute herein defines "use" of minerals in part as ". . . when taxes are paid on such mineral interest by the owner thereof". Thus, only mineral owners who do not pay taxes are affected by this statute. Non-payment of taxes and the low tax base of Eastern Kentucky and Tennessee has meant that essential public services are below average.

Although Appalachian Kentucky and Eastern Tennessee are part of a naturally wealthy area, blessed with large concentrations of coal and lush green mountains, the region suffers from a chronic lack of public services. Services such as public water and sewerage systems, education, highways, libraries, and housing are substandard, especially considering the wealth of the region. Inadequate local tax revenues, in part caused by non-taxpaying abandoned mineral lands, hinder local attempts to provide these services.[11]

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11. In Eastern Kentucky, water and sewerage services are usually provided by governmental entities. In many counties, water services do not extend far beyond incorporated city limits and often services provided do not conform to state water quality standards. Some counties, such as Martin County, Kentucky have no sewerage system. See 3 Appalachian Land Ownership Study, Appalachian Land Ownership Task Force, at 82 (1980) (as submitted to the Appalachian Regional Commission).

Public roads and highways are not adequately maintained in many cases. The Kentucky Bureau of Highways concedes that in 1980 county roads for which it had primary responsibility were not adequately maintained. Eastern Kentucky roads require frequent repair of damage from heavy coal truck traffic. Tennessee has similar problems. Some of these roads become dangerous with poor maintenance -- such as roads along mountainsides without shoulders. See Kentucky Legislative Research Commission, Highway Maintenance In Kentucky, Report No. 168, at 80 (1980). See also, Kentucky Legislative Research Commission, The Fiscal Impact of the Coal Industry, Report No. 172, at 13 (1980).

The lack of adequate housing in Eastern Kentucky is very severe. According to one study in 1977 there were only seventeen (17) vacant suitable homes in Pike County, Kentucky, (which is 0.06% of the housing stock).[12] Much of the available housing is substandard. Harlan County, for example, is estimated to have 53% substandard housing.[13] The Commonwealth of Kentucky, through the Kentucky Housing Corporation, has therefore intervened and provided, by 1979, grants and loans for about 3,000 homes in the region. But as admitted by the Kentucky Housing Corporation, the housing stock is still inadequate.[14]

There are other services lacking in the region. For example, garbage collection is poor. Public library facilities are sometimes inadequate. Martin County, Kentucky, the second leading coal producing county in Kentucky, has no public library at all.

Eastern Kentucky and Tennessee are heavily dependent on the coal industry. By 1970, farming and farm work had become of negligible significance

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12. 3 Appalachian Land Ownership Study, supra, at 140.

13. Id, at 84.

14. Kentucky Housing Corporation, Housing Development In Appalachian Kentucky, KAHP Contract Ky-77-(c)-7-A, at 1 (1979). Kentucky Housing Corporation was created pursuant to Ky. Rev. Stat. §198A (1980), as a quasi-governmental housing agency.

as a source of earned income. *University of Kentucky Department of Agriculture,* RS-56, *Eastern Kentuckians View Their Quality of Life,* at 4 (1979). While the area has benefited economically from the growth of the coal industry, mineral ownership by out of state absentee owners inhibits the industry from significantly assisting in providing these services. About 50% of all minerals in Eastern Kentucky are owned by absentee owners, who tend to bring the profit derived from mining to their home regions rather than investing them in needed services in Eastern Kentucky.[15]

Obviously, with greater revenues at the state and local level, communities in Eastern Kentucky and Tennessee would be better able to provide these services. Revenues from severed mineral lands are not extensive and some severed mineral owners pay no taxes at all. For example, one of the largest severed mineral holders in Martin County owns about 10,000 acres of mineral lands and in 1979 paid no property taxes at all. See Appendix, at 6a. It is clear that many severed mineral owners do not pay property taxes in Eastern Kentucky and

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15. Appalachian Regional Commission, Land Ownership Patterns and Their Impact on Appalachian Counties, Contract 79-79, at 32 (1981).

Tennessee.[16] There is no reason to believe that this is a recent development.

> "It would be wrong, however, to give the impression that the problem is merely a technical one. In the coal counties of the region, the coal owners traditionally have had their own way, often using their political muscle to make or break the political fortunes of local officials--especially tax assessors. In many cases, the companies have supplied assessors with their own assessments of property values, and assessors have had little choice but to accept them. Where attempts are made to alter the traditional patterns of under-assessment, the coal owners may simply refuse to cooperate, as was seen in Eastern Kentucky where they failed even to return tax forms regarding their properties."

Appalachian Regional Commission, Land Ownership Patterns and Their Impacts on Appalachian Counties, Contract 79-79, at 88 (1981).

In Eastern Tennessee, the problems are similar.

> "In many cases, owners of property with severed minerals have no idea of the situation which they face. Tennessee has no requirement

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16. Id, at 21-33. See also, Appalachian Regional Commission, Land Ownership Patterns and Their Impacts on Appalachian Counties, Contract 79-79, at 68-98 (1981).

that mineral owners accurately describe and locate their property, and tax records on mineral rights are poorly kept, with very few county assessors even having knowledge of the existence of all severed mineral properties or who controls them. In many cases, the original severance took place over one hundred years ago and often this severance has been dropped from the surface title, giving prospective owners no warning.

One example is an Anderson County deed in which the coal was excluded in an 1856 transaction. The fact of this encumberance was not recorded when the property again changed hands in 1883 and a title search by a bank in 1972 failed to uncover the earliest deed in the chain of title which was not accurately referred. Coal Creek Mining Company obtained title to the mineral rights in the 1890's and the present landowner only accidentally discovered in 1978 that a large coal land company controlled the minerals beneath the property. In Van Buren County, although a number of residents have deeds stating that their minerals are excepted, being presently controlled by J. M. Huber Corporation, the county has no severed mineral properties on its tax rolls whatsoever." See 5 Appalachian Land Ownership Study, *supra,* at 24-25.

So, taxes assessed for severed mineral lands tend to be extremely low. In Eastern Kentucky, the severed mineral owner paid about $.002 per acre in

property taxes in 1978-79.[17] Taxes assessed on severed mineral lands is far less than taxes collected for other lands. For example, in Johnson County, Kentucky, a large sample of corporate severed mineral holders paid 800% less per acre than other corporations in the county in 1979; a sample of individual mineral holders paid 75,000% per acre less property taxes than other individuals.[18]

With such low tax burdens there can be no justifiable reason for severed mineral owners not paying property taxes. Non-payment of property taxes means that Kentucky and other mineral producing states, already strained in the assistance they can provide to the coal counties, are even less able to assist in providing needed services to these counties and localities. Severed minerals cover substantial amounts of coal lands in Eastern Kentucky and Tennessee.[19] Loss of tax revenue from non-payment of taxes could be significant.

The Indiana Mineral Lapse Statute applies only to severed mineral lands for which no taxes were

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17. Kentucky Law places a very small tax on unmined minerals. See KRS §132.020(5) (1980) which places the tax at 1/10¢ per $100 of assessed. Under Kentucky Law property must be assessed according to its fair cash value. Ky. Const. §172. This partly accounts for low tax receipts of unmined minerals.

18. See 3 Appalachian Land Ownership Study, at 179.

19. See 5 Appalachian Land Ownership Study, at 11.

paid for over 20 consecutive years. This statute will promote use of the property in a manner which will increase the local tax base, which in turn will help provide needed public services.

All the while the burden on the property tax base is being borne by the surface owner. See discussion at 26-27, *supra.* Because the surface owner is maintaining the land during the mineral owner's absence, and because the surface owner is paying most of the region's property taxes, the Indiana legislature was reasonable in determining that a mineral owner's interest should lapse, where no property taxes are paid on the minerals or other active claim to the minerals is made. The surface owner who solely cares for the land and pays taxes on it for over 20 years is reasonably entitled to sole ownership. States should be free to make this determination, as they do with other statutes of limitations. (See *Terry* v. *Anderson,* 95 U.S. 628, 24 L.Ed. 365, (1877)).

"An analysis of economic development patterns in coal counties of Appalachia must start, then, with several observations: the dominant single industry development is highly dependent upon the control of a few, primarily corporate hands, who control the land and resources; while large amounts of wealth are produced, much of it leaves the region. Even the wealth which stays in the region is unevenly distributed leading to the persistence of poverty

amidst riches." Land Ownership Patterns and Their Impact on Appalachian Counties, *supra*, at 105.

"[T]he legislature adopted means which . . . themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving [mineral] interests." *Short* v. *Texaco, Inc.*, - Ind. - , 406 N.E.2d 625, 631 (1980).

IV. SURFACE OWNERS WHO IMPROVE AND DEVELOP REALTY HAVE A REASONABLE EXPECTATION OF OWNERSHIP OF ABANDONED SUBJACENT MINERALS.

As discussed, abandoned and other unused mineral estates do not provide much assistance to local tax revenues and consequently contribute to inadequate public services. Further, the existence of such mineral estates deter development of services -- such as housing -- by the surface owner. Lenders are reluctant to invest in such projects where minerals are severed, no matter how "absent" the mineral owner may be. Even if mineral owners filed a statement of interest, which would protect their holdings under the Indiana Lapse Statute, surface owners could identify and contact these mineral owners, for the purpose of surface development.

The Kentucky River Area Development District[20] located in the heart of the Eastern Kentucky coalfields explained the relationship between the depressed economic condition in Eastern Kentucky and the severance of mineral estates by the broad-form deed as follows:

> "In the development of their region-wide Land Use Plan, its compilers have been confronted repeatedly with one basic, all-important factor -- the extent to which ownership of surface and sub-surface (minerals) lies with separate parties. While no information exists on the exact percentage of land with divided ownership, it can be estimated reasonably that from 50 to 75 percent of all the area's land either has such separate ownership or the owners of both are interested primarily in extraction of sub-surface minerals.
>
> "This situation increases the difficulty of successful development planning of surface rights, especially where the 'broad-form' deed to minerals exists.
>
> "Thus, although an average of more than 80 percent of the area's land is identified as forests on the basis of the present and practical use of the surface, if the sub-surface mineral rights are owned by anyone other than the

20. The Kentucky Area Development District is a statutorily created, multi-county planning and development agency, established pursuant to Kentucky Revised Statute §147 A. 050 *et. seq.*

owner of the surface, such classification is erroneous. Production of timber is a slow process and 20, 30, or 40 years of timber development can be wiped out overnight by a decision to disturb the surface to reach mineral deposits.

"Even areas not likely to be subjected to mineral extraction are affected by this situation, for many of them are required for use in the processing and transportation of extracted minerals.

"A result of this situation has been the reluctance of people to invest in non-mineral development. The existence of such an abundance of minerals, primarily coal, whether their extraction is currently economically possible, or not, deters investment in other fields of economic enterprises.

"As matters now stand, the decisions regarding the areas' economic and social future development rests almost totally with owners of the areas' sub-surface rights. This is not a state policy, but a policy inherent in the present legal status.

"Common sense dictates that local and state governments recognize the existence of this unofficial policy-making authority and act to establish an official public policy. The choices can be stated quite simply: shall the area where needed minerals exist so abundantly be dedicated wholly to the provision of those minerals to meet national needs, or does the long range goals of the area and nation require that

> ownership and production of minerals be coordinated with all other economic and social development?
>
> "Only when such a public policy is clearly enunciated can there be created a worthwhile plan for the future on which can be based sound decisions for private and public investments.
>
> "The reader, and student of this and similar documents should keep in mind that the above described condition is prevalent throughout the District. The proposals contained herein, therefore, are presently subject to changes based on private, rather than public decisions." *Land Use Plan for Kentucky River Area Development District*, prologue, (1973).

Perpetual severance of minerals can inhibit the development and growth of whole communities.

Two of the *amicus curiae*, the DCDC and SOCM, have had plans for development of their surface tracts thwarted by the apparently abandoned subjacent mineral estate.[21] Surface owners like the DCDC and SOCM can reasonably expect to develop abandoned property.

The town of David consists of about 1,000 acres in South Eastern Floyd County, Kentucky. The town is a former coal mining camp, from which

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21. The difficulty of ascertaining the identity of mineral owners makes it hard to determine if the mineral owner ever intends to return. See Land Ownership Patterns and their Impact on Appalachian Communities, *supra*, at 88.

coal mining occurred, starting in 1941 until 1968, when the coal mines closed. The coal operator owned surface rights and leased the mineral rights from 3 co-owners. The operator built about 35 homes in David which were leased to the miner's families. When the coal mines closed in 1968 the coal operator sold the surface to a land holding company but maintained its mineral leases. At that time, the coal operator left the David Community. Most, but not all of the coal had been mined.

The new surface owner rented the coal camp homes to the remaining residents, but because poor services were being provided by the landlord, members of the community formed the David Community Development Corporation, Inc. (DCDC). The stated purposes in their articles of incorporation included providing greater financial and other opportunities for lower income people in David and Eastern Kentucky.

The DCDC, through local contributions and loans, purchased 800 surface acres of the David Community from their landlord in 1975. The DCDC then sold all remaining homes in David to the tenants at reduced prices. The new owners renovated their homes themselves taking pride in their purchases. Town clean-ups were organized. The DCDC assisted the development of a new community water system and built a sewer system. Then they constructed a new sub-division for lower

income families. They further designed a housing development plan.

In 1980, the DCDC wanted to construct a new 48 unit apartment complex for mixed income tenants. The U.S. Department of Housing and Urban Development (HUD) gave tentative approval to the project and set aside funds for construction under the "Section 8" program. See 42 U.S.C. 1436(f). HUD, however, demanded that the mineral owners release or waive their interest in the tract.

The DCDC approached the coal operator, asking for this release, the area being previously mined. The operator answered that it only had a mineral lease and that there were 27 individual owners, promising to contact the owners. The DCDC much later asked the operator about the status of its request for a release, but doubt was expressed about whether all 27 owners could be found. Then one of the owners told the DCDC that the operator had notified him of the DCDC request an hour before and the owner said that he would need time to decide whether a release was wise. The HUD construction loan was then lost; obtaining the written release of 27 unknown owners was beyond its powers. See Appendix, at 8a.

Further, the DCDC wants to build a new sub-division in the best housing site in David. However, coal is still beneath this area (although it may be inaccessable). It may be difficult or

impossible for the DCDC to build any houses here, because of the encumbrance of the mineral rights.

Several SOCM members live in residential areas of Hamilton County, near Chattanooga where mineral rights were originally severed over 100 years ago and mineral reserves were mined out by deep mining methods early on this century.

Mineral reservations in some of these deeds were omitted over 30 years ago and there has been no mining since the company left in the 1940's.

One SOCM member subdivided part of his land into two acre lots for residences. Several purchasers of these lots obtained bank loans to build houses. However, around 1977, landowners began receiving rejections to their loan applications. Since then they and other surface owners on and near the Cumberland Plateau, have been unable to obtain loans to build their residences. Banks based their refusals on a policy of not granting loans on property where mineral rights are owned by a third party. See Appendix at 9a-10a, for an example of letters received by several SOCM members.

As demonstrated from the opinions of the Kentucky River Area Development District, these problems are typical in the coal fields. See generally, Land Ownership Patterns and Their Impacts on Appalachian Counties, *supra,* at 101-121.

The problems discussed above adversely affect the value of the surface, even in established and developing residential communities. The state has a strong interest in regulating the relationship between surface and mineral owners to stimulate both mineral and surface development. The problems of perpetual clouds on surface titles and problems identifying mineral owners in order to attempt to purchase their interest are legitimate concerns of a state legislature.

A Mineral Lapse Statute requiring merely recording a claim, paying taxes, or extraction of minerals, allowing abandoned interests to lapse and revert to the surface owner is a legitimate way to stimulate development.

CONCLUSION

For the reasons set forth in this brief, it is respectfully requested that the Indiana Mineral Lapse Statute be upheld as constitutional and that the decision of the Indiana Supreme Court be affirmed.

Respectfully submitted,

JOHN M. ROSENBERG and
DAVID RUBINSTEIN
Appalachian Research and Defense Fund of Kentucky, Inc.
P. O. Box 152
Prestonsburg, Kentucky 41653

CANDY A. CULIN
Save Our Cumberland Mountains, Inc.
P. O. Box 457
Jacksboro, Tennessee 37757

Attorneys for Amicus Curiae

APPENDIX

THIS INDENTURE, made this 17th day of June, 1912, between James Dobson and wife Sarah Dobson, Henry Dobson and wife Elizabeth Dobson of Perry County, Kentucky, party of the first part, and Vizard Investment Company, a corporation incorporated under the laws of the State of Alabama, of the second part.

WITNESSETH, That for and in consideration of Sixty one and 20/100 dollars, and other good and valuable consideration in hand paid by party of the second part to party of the first part, the receipt of which is hereby acknowledged, the party of the first part does hereby sell and convey unto the party of the second part, its successors and assigns, all the coal, minerals and mineral products, timber, rights and privileges as hereinafter mentioned on and under the hereinafter described boundary of land, all coal minerals, and mineral products, all oils and gases, all salt minerals and salt water, fire and potters clay, all iron ore, all stone, and such of the standing timber under fourteen inches in diameter as may, or by the "Grantee" herein, be deemed necessary for mining purposes, and the exclusive rights of way for any and all railroads and ways and pipe lines that may hereafter be located on said property by the "Grantee" its successors or assigns, under authority of said "Grantee" or assigns, in, under concerning or appurtenant to the hereinafter described tract of land, together with the right to enter upon said

lands, use and operate the same and surface thereof and make use of and for this purpose divert water courses thereon in any and every manner that might be deemed necessary or convenient for mining and therefrom removing or otherwise utilizing the products of said minerals, and for the transportation therefrom of said articles, and the right to use of such, as well as for the removal of the products taken out of any other land owned, or hereafter acquired by the "Grantee". Free excess to, upon and over the said land is hereby conferred upon the "Grantee" for the purpose of surveying and prospecting the aforesaid property and interests: but there is reserved in this deed to the "Grantor" coal for his own family use for fuel, also all the timber upon said land, except that necessary for mining and the purposes hereinbefore mentioned, and the free use of land for agricultural purposes, so far as such use is consistent with the rights hereby sold.

Lying and being in the County of Perry, State of Kentucky, on the waters of Left Fork of Second Creek, and bounded as follows:

[Description Omitted]

The "Grantor" further covenants that he is seized in fee simple of said land and out of the rights thereon and thereunder, in actual possession thereof, and has good right and full power and authority to convey same, and that "Grantee" shall and may have, hold and enjoy the rights granted

herein, free from eviction or disturbance by title paramount to that conveyed by this deed, and that the land including the interests hereby sold and conveyed are free from all liens or encumbrances.

TO HAVE AND TO HOLD, said property unto the party of the second party, its successors and assigns forever. And said party of the first part hereby releases all their rights, title and interest in said property, herein conveyed, and Covenant to Warranty Generally the title thereto.

IN TESTIMONY WHEREOF, the party of the first part hereunto set their hands the year and date first above written.

James Dobson, (Seal)

Sarah Dobson (Seal)

his
Henry X Dobson (Seal)
mark

her
Elizabeth X Dobson (Seal)
mark

Attest:
E.C.Wooton.

* * * * * * *

TABLE III: SEVERED MINERALS

County	Total Surface Acres	Total Severed Mineral Acres	Percent Severed Acres
Campbell	288,640	N/A*	N/A*
Anderson	214,400	N/A*	N/A*
Roane	224,000	4,446	1.98%
Scott	348,160	23,389	6.72%
Morgan	344,960	10,401	3.01%
Fentress	318,720	83,999	26.35%
Cumberland	434,650	59,234	13.63%
White	244,480	42,855	17.53%
Van Buren	162,500	N/A*	N/A*
Bledsoe	258,500	74,235	28.71%
Sequatchie	174,720	55,146	31.56%
Marion	323,840	28,630	8.84%
Rhea	199,680	45,841	22.96%
Hamilton	352,000	34,304	9.75%
TOTAL FOR 14 COUNTIES	3,889,250	462,477	11.90%

*N/A - Counties in which separate mineral holdings are not listed in the tax records.

SOURCE: 5 Appalachian Land Ownership Study, *supra*, at 11.

TABLE III-6
AD VALOREM MINERAL TAXATION IN FOUR SOUTHERN APPALACHIAN COAL PRODUCING STATES

State	Pertinent Legislation	Implementation	Assessment Procedures Applied to Minerals	Average Tax Per Mineral Acre (For Sample Counties)
Alabama	All real property should be assessed at its fair and reasonable market value.	No assessment of minerals where held "fee simple"with land above. "Self-assessment" of severed mineral rights	Assessment rate of 10% is applied, the rate for timber, agricultural and residential land	4¢
Kentucky	Appraised at fair market value; but uniform tax set by legislature on "unmined coal" at 1/10¢ per $100 valuation.	In hands of county property valuation administrator; lack of cooperation by companies; no state program.	Most coal land assessed at "agricultural and horticultural" rate--giving up to 50% tax break.	.2¢
Tennessee	Developed and undeveloped minerals to be valued by formula established by State Board of Equalization	Formula applied in only 3 counties; state has discontinued mapping program for counties.	Coal property assessed as "agricultural" (25%) except what is underlease to mine (40%).	15¢
West Virginia	Mineral lands to be taxed at an equal rate to other land.	An extensive mapping and coal valuation program has been established by the state; partially implemented in 30 counties	Varies from county to county. Most assessors have taken 50% of values recommended by state.	$1.09

*See calculations, pp. 84-88.

SOURCE: Appalachian Land Ownership Study, 1980. Land Ownership Patterns & Their Impacts on Appalachian Counties, *supra*, at 79-80 (The Virginia statistics are also characteristic of the region.)

TABLE 1.
TOP LAND OWNERS AND TAXES PAID PER ACRE
MARTIN COUNTY, KENTUCKY

Name	Address	Total Surface Acres	Total Mineral Acres	Total Property Taxes	Total Property Taxes Per Acre
1. Pocahontas Kf	Roanoke, Va	47,869	81,333	16,902.1	0.35
2. Martiki Coal	Tulsa, Okla.	5836	283	2,059.0	0.35
3. Mt. Sterling Co.	Bluefield, W.Va.	1206	1,206	660.1	0.55
4. Fitzpartrick,	Beauty, Ky	989		134.9	0.14
5. Coff Land Co	Williamson, W.VA.	835		294.6	0.35
6. Pontiki Coal Co	Tulsa, Okla	793		287.1	0.36
7. Wiseman, TJ EST	Bluefield, W.Va.	785		63.65	0.08
8. Blankenship, MR	Columbus, Oh	765		144.45	0.18
9. Hardin, TJ Hedr	Ines, Ky	755	1,520	177.15	2.24
10. Blackburn, Mary	Cleveland, Oh	725		254.8	0.35

*Based on taxes on surface + listed minerals + improvements. Where minerals are held fee simple and not listed separately for tax purposes, the total acreage is underrepresented and thus the total tax per acre is overstated.

TABLE 2.
TOP MINERAL OWNERS*
(If not included in Table I.)

Name	Address	Total Surface Acres	Total Mineral Acres	Total Property Taxes on Minerals	Total Property Taxes Per Acre
1. Harvard Univ.	Boston, Mass.		9720 (oil & gas)	0	0
2. Hewitte, Arch	Ashland, Ky		2426	4.24	.002
3. Dempsey, MK Hrs	Ines, Ky		1890	3.49	.002
4. Jefferson Coal	Ashland, Ky		1417	2.47	.002
5. Williamson, Rus	Ines, Ky		1084	.94	.001
6. Ward, W. J. Jr.	Richardson, Ky		1061	1.96	.002

*All mineral owners above 1,000 acres, if their mineral rights are recorded on the tax rolls.

SOURCE: 3 Appalachian Land Ownership Study, *supra*, at 206.

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November 28, 1979

David Community Development Corporation
Post Office Box 51
David, KY 41616

Mr. Fred Porterfield
Housing and Urban
Development
601 S. Floyd St.
Louisville, KY
40202

Dear Mr. Porterfield,

On November 28, 1979, the staff of the David Community Development Corporation met with Hale Roberts and Gary Baldwin to discuss the possible release or waiver of mineral rights connected with a 24-unit Section 8 project called Hawk Howard Heights located in David, Kentucky.

Mr. Baldwin came on behalf of David L. Francis, owner of the mineral rights. Mr. Roberts filed the application with HUD on behalf of the David office. Since Mr. Francis is out of the country at this time, it is impossible for us to get any document signed. There has to be some time for the people in his office to determine whether or not they would recommend that a release or waiver be given to the David Community Development Corporation.

I am, at this time, asking for a 30-day extension with a possibility that another 30 days may be needed. I feel that within this time we will be able to work out any problems and this will be sufficient for Mr. Francis to prepare the proper document.

Because of the critical housing shortage in our area and because David is making a terrific come-back in housing, I sincerely hope this extension will be granted to us.

You may reach me at 606 - 886 - 8508 should you need any information concerning Hawk Howard Heights. Thank you, I remain,

Cordially,

Dorothy G. Clark
Executive Director

DGC:ss

KENTUCKY
MORTGAGE
COMPANY
INCORPORATED

P. O. BOX 13013 • LEXINGTON, KENTUCKY 40512 • (606) 276-4322

MEMO TO: Dorothy Clark
Joe Ray-Serreau
Julie May
Cecil Dunn

FROM: Nancy Thorne (Signed)

SUBJECT: Hawk Howard Heights
Hazard, Kentucky

DATE: June 25, 1980

Attached is the letter HUD sent Kentucky Housing on June 20 cancelling the units at Hawk Howard. I'm not surprised as HUD is out of Section 8 rent subsidy funds for projects that are ready to close. They are frantically pulling dollars from projects which are not moving in order to get 1980 starts.

I believe that, if we can get our site title straightened out and get some front money through grants or something, we could get units and start over. According to my notes, on April 22 Dorothy reported that Paul Evans was willing to sit and discuss mineral rights. I suggest we keep pushing at that and since quite a bit of ground work has already been done.

In fact, Kentucky Housing will be advertising soon to allocate 600 units. I would doubt that we could have our act together by that time but it may be possible. In any case, if I can be kept abreast of mineral rights progress and grant progress, I'll do what I can to find the units.

First Federal
SAVINGS AND LOAN ASSOCIATION
of CHATTANOOGA

DALLAS BAY OFFICE

DALLAS BAY OFFICE - 9539 HIXSON PIKE - HIXSON, TENNESSEE 373
615-842-0503

August 30, 1977

Mr. Raymond Weaver
Leggett Road
Sale Creek, Tennessee 37373

Dear Mr. Weaver:

Thank you for allowing us to review your deed and title policy along with the new bill passed by the State Legislature regarding coal strip mining. It appears that we would be unable to make a home loan on your property due to clause six of schedule B of your title policy. It is my understanding that the title compan, probably would not remove this clause from the title policy.

Should you be able to acquire the mineral rights to the property, we would be happy to further entertain the possibility of a home mortgage loan.

If we can be of further service to you please let us know.

Sincerely,

Dwight P. Montague

DPM/hj

Insured Savings - Home Loans

CHEROKEE VALLEY FEDERAL
Savings and Loan Association

CLEVELAND · SWEETWATER · CHATTANOOGA, TENNESSEE

Dear Mr. Raymond Weaver

We regret that Cherokee Valley Federal Savings and Loan Association could not approve your loan application. As required by Regulation B, Section 701(a) of the Federal Equal Credit Opportunity Act, we are notifying you in writing of our decision and the reasons for the decision regarding your loan application. The details of this notification are found below.

If you have any questions in regards to this information, please feel free to contact us.

Sincerely,

R. L. Holes

R. L. Holes

STATEMENT OF CREDIT DENIAL, TERMINATION, OR CHANGE

Date August 30, 1977

Applicant's Name Raymond Weaver

Applicant's Address Leggett Rd. Sale Creek, Tn. 37373

Description of Account, Transaction, or Requested Credit:

Description of Adverse Action Taken:

Principle Reason (s) for Adverse Action Concerning Credit:

Credit application incomplete	Insufficient credit references
Unable to verify credit references	Temporary or irregular employment
Unable to verify employment	Length of employment
Insufficient income	Excessive obligations
Unable to verify income	Inadequate collateral
Too short a period of residence	Temporary residence
Unable to verify residence	No credit file
Insufficient credit file	Delinquent credit obligations
Garnishment, attachment, foreclosure, repossession, or suit	Bankruptcy
XXX We do not grant credit to any applicant on the terms and conditions you request	Major structural deficiences
Loan to value excessive	Term exceeds economic life of property
Other, specify: As an association policy we do not grant loans on property where the mineral rights are owned by a third party.	

Disclosure of Use of Information Obtained From an Outside Source

Disclosure Inapplicable

Information obtained in a report from a consumer reporting agency

Name:

Street Address:

Telephone Number:

Information obtained from an outside source other than a consumer reporting agency. Under the Fair Credit Reporting Act, you have the right to make a written request, within 60 days of receipt of this notice, for disclosure of the nature of the adverse information.

Creditor's Name:

Creditor's Address:

Creditor's Telephone Number:

The Federal agency administering compliance concerning notification is:

The Federal Home Loan Bank • 2500 Dubois Tower • Cincinnati, Ohio 45202

CVS 842-8-77